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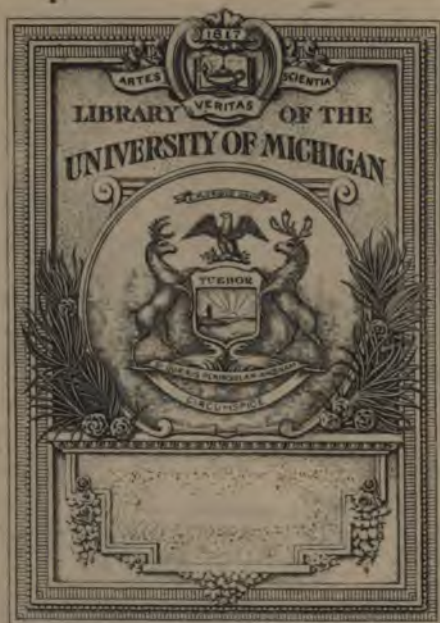
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A STUDENT'S MANUAL
OF
ENGLISH CONSTITUTIONAL HISTORY

Oxford

HORACE HART, PRINTER TO THE UNIVERSITY

A
STUDENT'S MANUAL
OF
ENGLISH CONSTITUTIONAL
HISTORY

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PREFACE

AN author needs to justify the appearance of so ambitious and yet so imperfect a work as I fear this will be found. A twofold reason has prompted its compilation. In the first place, text-books on Constitutional History are few, and experience suggests that those which exist deal with the subject on unsatisfactory lines. The development of an institution is subordinated to the details of a general narrative. No doubt the natural interest in the play of individual character will always place so-called political history in the van of historical pursuits. But if the study of history is, as it promises, to become a great educational medium, it is to the history of institutions rather than of dynasties or of individual men that we must look to provide the fittest mental training. As a preliminary it is necessary to trace the evolution and growth of each institution or set of institutions separately and apart from the accidental events of contemporaneous political history. Otherwise the institution is lost sight of in a mass of unimportant personal detail; it is difficult to pick up the threads of its development while the

attention of the student is at every turn called off to irrelevant matter, and the mind altogether fails to comprehend the great impersonal movement by which an institution shows itself to be something greater than the greatest man who has helped to mould and to work it. In fact our urgent need is a scholarly Dictionary of English Institutions apart from a more general Dictionary of English History. Until we obtain this it may not be amiss to attempt in a series of sketches to exhibit the separate growth of each great department of our Constitution.

My second object has been to bring together some of the fresh work done within the last few years in this department of study, which as yet exists for the most part in scattered publications. The history of our Constitution was, for a long time, left to antiquarians and lawyers. But the rise of a class of scientific historical students has given an impetus to this branch of study also. The great work of Dr. Stubbs, no less than the contributions of Hallam and Sir T. Erskine May, will probably always be our starting point; but in the light of additional knowledge it seems that many of their conclusions require modification if not restatement. The masterly studies of Professor F. W. Maitland in the social and political institutions of mediaeval England, and the illuminating treatises of Professor Dicey and Sir W. Anson on their present development, together with the work of many writers not professedly historians of our Constitution, seem to render it important to review the whole ground afresh. Perhaps the attempt is as yet premature. But since many of the accepted theories have already been profoundly altered, I have contented myself merely with stating as fairly as is consistent with the necessary brevity of a text-

book, both the commonly received views and their recent modifications, without attempting, except very indirectly, to decide upon their respective merits. But I cannot pretend to have used, much less to have incorporated, more than a small portion of the mass of recent work. For various reasons the preparation of this book has been far more hurried than could have been wished. At the same time it has grown to so great a bulk that I have been forced to omit the illustrative cases in Constitutional Law and extracts from documents, which in many points would have elucidated an otherwise obscure text. These it may some day be advisable to add in a supplementary volume.

I hardly like to think how much, indeed how entirely, I am indebted to the work and the personal kindness of others. The former will be gathered from the side-notes on almost every page. Among those by whose personal assistance I have profited, I may perhaps be allowed to mention Mr. F. J. Haverfield, M.A., Student of Christ Church, who has given me indispensable help on the much debated question of our early ~~debt~~ to Rome; the Rev. A. H. Johnson, M.A., Tutor of Merton College, who supervised the section on the Land Laws; Mr. C. Raymond Beazley, M.A., Fellow of Merton College, and Mr. C. H. Firth, M.A., of Balliol College, who read over a large portion of the proof-sheets and whose corrections have saved me from more than one mistake. But above all I am grateful to my friend and former pupil, Mr. Frank Morgan, B.A., of Keble College, who read the whole of the book both in manuscript and in proof, took a large share in the compilation of the index, and was unflagging in the discriminative criticism to which he subjected every

page. Finally, I cannot conclude without a reference to Mr. A. L. Smith, Fellow of Balliol College, who will find numerous traces of those lectures on early English Constitutional History which have stimulated so many generations of students in the Oxford Modern History School.

D. J. MEDLEY.

OXFORD, *June*, 1894.

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ENGLISH CONSTITUTIONAL HISTORY

INTRODUCTION.

§ 1. AMONG systems of government the English Constitution holds a pre-eminent place; for it is the result of a practically unbroken development of thirteen hundred years. Perhaps for this reason among others it has, during the last century and a half, been freely copied. Nearly every progressive nation of the world now possesses a system of government by an executive of ministers and a deliberative body of two chambers. It may be said, without fear of contradiction, that this form originated in England; and its prevalence throughout Europe and America is the result of conscious imitation. But there is this one great difference between the original and all the imitations—that, whereas all foreign constitutional governments sprang Minerva-like from the brain of the legislator, the English Constitution is the result of forces and influences which have been at work for thirteen successive centuries; and while we can, by reference to a written document, gain a sufficiently accurate acquaintance with the governmental method of most foreign parliamentary constitutions, our knowledge of our own constitutional arrangements has to be sought as much in customs as in definite law. The results are so important as to excuse, and indeed to necessitate, a further examination.

A Constitution has been defined as the product of 'all rules, which directly or indirectly affect the distribution, or the exercise of the sovereign power in the State'. It might justly be thought that such rules in each particular country would be as infinitely various as is the history of each country from that of any other; but as a matter of fact, the sum total of such rules may be distinguished into two classes. The dividing line is to be found in the method by which any fundamental

Character-
istics of the
English
Constitu-
tion.

Flexible
and Rigid
Constitu-
tions.
Dicey,
*Law of
Const.*
(3rd ed.),
p. 22.

change may be carried out in the structure of the Constitution. Thus in our own English system, any change, whether great or small, whether fundamental or merely corrective, is carried out by the process of ordinary legislation. To such a Constitution, of which as yet England is the sole example, the epithet *Flexible* has been applied; and in such a Constitution the Parliament or legislative body is of necessity the sovereign power, for there is nothing to hinder it from changing or annulling at will all the laws of the commonwealth. All other parliamentary constitutions have been conveniently labelled as *Rigid*, inasmuch as the whole or some part of them can be changed only by some extraordinary method of legislation. For they spring from a written document, in which the sovereign power may be said thenceforth to repose. Thus there is a difference between a legislative and a constituent assembly, such as has only twice been realized in England, at the epochs of the Restoration, and the Revolution; and there is a marked distinction between fundamental laws which can only be touched by a constituent assembly, and ordinary laws which fall within the competence of the ordinary legislature.

Results of
the differ-
ence.

¹ Chap. ix.

² Dicey,
*Law of
Const.*
p. 207.

From the division between these two kinds of Constitution there follow three noteworthy results. In the *first* place, *the rights of individuals are guaranteed*, in a rigid Constitution, by a fundamental article in the Constitution; whereas in the flexible Constitution of England, as will be seen in dealing with the Liberty of the Subject¹, they depend on the indirect, but no less sure, safeguards of judicial decisions and specified legal remedies. *Again*, and perhaps as a necessary consequence of this difference, it has proved an irresistible temptation to fill all rigid Constitutions beyond the fundamental laws strictly so called with a number of articles which merely state advantageous maxims of policy unsecured by any guarantee; whilst the piecemeal method in which the flexible Constitution of England has been compiled, has resulted in an inseparable connexion between the means of enforcing a right, and the right which is to be enforced². *Finally*, the term *unconstitutional* undergoes a change according as it is applied to an act or law under a flexible, or under a rigid Constitution: for, whereas in England it implies something that is opposed to the *spirit* of the Constitution, but brings no immediate penalty with itself; th

unconstitutional act of an individual, or an assembly in a country ruled by a rigid documentary Constitution, is one which is either beyond the competence of those who commit it, and so *ipso facto* void, or which incurs a punishment affixed to it in the written articles of the Constitution. In such a case unconstitutional and illegal are one and the same thing. This distinction will make clear what is meant by the boast that England is governed by an *unwritten* Constitution.

But it does not follow that the English Constitution has no bases. Indeed, although it will be found that in one sense of the term the taunt of a foreign writer is true, that we have no Constitution¹; yet we may look in two directions for the guarantees of the ordinary action of our machinery of government. In the *first* place, an important part of the ordinary law of the land is formed by what is called Public or *Constitutional Law*, which, consisting (like the rest of the Common Law) of parliamentary Statutes and of judicial decisions based upon precedents, is merely for convenience distinguished from Private Law which governs the relations of individuals to each other: for both alike are enforced by the ordinary courts of law. The more impalpable part of the English Constitution, and that which marks it off more clearly from rigid Constitutions, is contained in the *Conventions of the Constitution*. These are practices, or rules, with which the law courts have immediately no concern, but whose object it is to ensure the harmonious working of the various members of the sovereign body, namely the Crown-in-Parliament. It is these informal understandings alone which for 200 years have prevented the exercise of the royal veto on bills passed by Parliament, which have caused the House of Lords to yield to the clearly expressed wishes of the nation, and which regulate the resignation of a ministry when it has been defeated on an important vote in the House of Commons.

Nor is this all; for, while it would seem at first sight as if the only guarantee for the maintenance of these understandings could be found in a powerfully expressed public opinion, a little reflection will show that they are merely as it were a first line of defence, and that their violation in the end involves a conflict with the law². Thus the repudiation of the convention in any one of the three cases stated above, would result in the refusal of supplies by the House of Commons, which could only be obtained

Bases of the English Constitution.

¹ De Tocqueville; quoted in Dicey, *Law of Const.* p. 21.

Connexion between the Law and the Customs of the Constitution.

² Dicey, *Law of Const.* p. 369.

by the King and the ministry through other than legal means. So true is this within certain limitations, that the difference between rigid and flexible Constitutions seems to resolve itself merely into an immediate and an ultimate appeal to the law. There is, however, an important difference between the functions of the law courts in the two cases. In a rigid Constitution it is within the power of the judges to treat as unconstitutional, and therefore illegal, any act of the executive or legislature which is at variance with the written articles of the Constitution ; whereas in England the judicial bench alone can decide whether the deeds of individuals are illegal or a violation of the letter of the law, and even such decision can be rendered useless as a precedent by subsequent legislation.

The Roman
or Teutonic
origin of
the English
Constitu-
tion.

§ 2. The English Constitution then, or the system and institutions under which we are governed, is a growth and not a manufacture ; and, consequently, its history is more expressive than in the case of any other nation of the character and development of the people who possess it. But it is possible to exaggerate the divergence between the course of English history and that of the kindred nations of the continent, and to lose rather than gain by so doing. However great the later differences may be, the English tongue, if not the people, was originally of that same Aryan type which is common to most of the European nations, as well as to large portions of the Asiatic world. To it belonged alike the Celtic peoples of the Gaels and Britons, and the Teutonic tribes, which in succession occupied this island. Again, Britain passed, no less than the rest of Western Europe, under the Roman yoke, and for three and a half centuries formed a province of the Roman Empire ; while in the train of the legions came ultimately that Christian faith which formed so strong a leavening and binding influence among the progressive nations of the world. But it has for some years been an accepted truth among English historical students, that the only cataclysm of which our history has to tell, began with the arrival on the shores of Britain of those Teutonic tribes whose descendants undoubtedly form the staple portion of the population in modern England. This theory has not gone without challenge either in the past or at the present day. Its acceptance or rejection make the history of the

previous inhabitants of this island either a piece of pure anti-quarianism or an important element in the formation of our present life. This is sufficient excuse for dwelling in some detail on the very threshold of our subject.

The two preliminary incursions by Caesar (B.C. 55 and 54) into Britain, with which its history begins, were followed after an interval of nearly a century by renewed invasions, ending in the conquest and occupation for 360 years of the southern portion of the island. The ordinary Roman organization with a staff of the customary officials was introduced, and the different parts of the country were connected by great roads. But Britain lay too far away to feel the effect of Roman colonization. The imperial rule was little more than a military occupation ; and, so far as evidence remains, it affected a handful of towns, whether municipia, of which there is only one known example, or coloniae, which numbered at least four. Outside these two sets of organized bodies, which differed in little save in name, lay the districts which probably continued in the possession of native tribes ruled by their chiefs, retaining their own language and, at any rate at first, their own customary law. The compulsory withdrawal of the Roman legions at the beginning of the fifth century left the country a prey to internal factions. The antagonism between the Romanized dwellers in the towns and the native population of the country districts has probably been overstated ; and the theory that when the latter welcomed the incursions of their more than dubious kinsmen, the Picts, the former summoned the Saxon pirates who were already familiar with the coast, seems to be based on no reliable evidence. Both invaders, however, did come ; and the plundering raids of the Saxons gave way, in 449, to systematic invasion and, finally, to a conquest, which did not cease till, a century and a half later, it had placed the conquerors in possession of all Eastern Britain south of the Forth.

The Conquest of Britain.

Here the different interpretations of the effect of this conquest part company. Of late years it has been assumed that *the English conquest of Britain was to be distinguished sharply from the conquest of Gaul by the kindred tribe of the Franks* ; for, whereas in the latter case the Romanized inhabitants of Gaul gave to their new conquerors far more than they received from

The theory of absolute Teutonic predominance.

them, it is held that in Britain alone the imperfect extent of the Roman civilization on the one side, and, on the other, the irreconcilable attitude of the Britons towards the new comers, resulted in *a war of practical extermination* by the Saxons, which in the end left behind none of the Romano-Celtic civilization to affect the settlers. 'Everywhere but in Britain,' Mr. Freeman tells us, 'the invaders gradually adopted Christianity . . . gradually learned to speak some form however corrupt of the language of Rome . . . respected the laws and the arts of Rome . . . and the local divisions, and the local nomenclature survived the conquest'.¹ In Britain, on the contrary, 'the English wiped away everything Celtic as well as everything Roman as thoroughly as everything Roman was wiped out of Africa by the Saracen conquerors of Carthage'.² As a result, the English retained their heathen worship, and owed their subsequent conversion to Christianity to other sources than the surviving and attenuated British Church: they retained their language almost free from any intermixture of Roman or Celtic words, until the conversion brought in a certain number of words of ecclesiastical Latin: 'the vestiges of Romano-British law,' says Dr. Stubbs, 'which have filtered through local custom into the common law of England . . . are infinitesimal': 'no dream of ingenious men,' says Mr. Freeman again, 'is more groundless than that which seeks to trace the franchises of English cities to a Roman source'; and finally, the 'local nomenclature is everywhere essentially Teutonic'.⁴ As a reason for this clean sweep it is pointed out that the invaders of Britain had least of all the Teutonic tribes previously come into contact with the Roman Empire. Thus no terms were kept between them and the inhabitants of the island. For one hundred and fifty years the English waged a war of practical if not literal extermination. The Britons fled before their conquerors to the western side of the island, and so complete was the separation between the two peoples, that when, a century after the first settlement, Augustine came with his gift of Christianity to the English, the British Church remained aloof and refused to help him in his work. On this land, so cleared of its former inhabitants and their civilization, the English tribes settled down, and reproduced in all essential

¹ *Norm. Cong.* i. p. 16.

² *Norm. Cong.* i. p. 20.

³ *Const. Hist.* § 28.

⁴ *Norm. Cong.* i. p. 17.

450-600.

597.

details the life of their society as they had lived it in their previous homes. For 'conquest under the circumstances,' says Dr. Stubbs, 'compelled colonization and migration . . . the invaders came in families and kindred, and in the full organization of their tribes . . . even the slaves were not left behind. The cattle of their native land were, it would appear, imported too¹.' Thus Mr. Green contends that 'the settlement of the conquerors was nothing less than a transfer of English society in its fullest form to the shores of Britain. It was England that settled down on British soil²'; and although, with Dr. Stubbs again, 'it is unnecessary to suppose that a migrating family exactly reproduced its old conditions,' yet it is substantially true to say that 'the new life started at the point at which the old had been broken off³.'

¹ *Const. Hist.* § 31.

² *Making of England*, p. 154.

³ *Const. Hist.* § 31.

To this reading of early English history the advocates of the continued existence of Romano-Celtic influences give a flat denial. It is to be remembered that it was through the Romanized Celts, according to this contention, that the civilization of the previous inhabitants chiefly, though not entirely, reached the new conquerors. The whole evidence produced by the upholders of this opinion, goes to *rebut the theory of the exceptional character of the English invasion of Britain*. They deny not only the possibility but the fact of the extermination of the Britons, and assert in the most uncompromising manner the unavoidable intermixture of the Britons and their conquerors, and the consequent far-reaching effect of the Romanized institutions of the former, on whatever Teutonic organization 'was brought in the keels of the invaders.' The evidence for this is drawn from many sources. Of these, the most direct is afforded by the language of the invaders. Instead of the 'few Celtic, and the still fewer Latin words' which 'found their way into English from the first days of the conquest', and which form two very small exceptions to the purely Low Dutch character of the English language, it has been maintained that 'hundreds of common words' relating not merely to domestic employments (such as would be transmitted by the female slaves, who alone are generally allowed to have been saved from extermination), but even to government, 'may still be traced in the limited Anglo-Saxon and Welsh vocabularies'; while rather more than a hundred Latin words,

The theory of Roman and Celtic survivals.

⁴ *Norm. Conq.* i. 17.

often to be found also in Welsh, prove the abiding influence of the Roman tongue. The retention of Celtic words also in relation to 'the arts of weaving, boat-building, carpentry, and smith's work¹,' would seem to show that the invaders accepted the teaching of their captives in some of the more skilful occupations. But besides this practically direct evidence, it has been conjectured² that a resistance which was sufficiently stubborn to protract the conquest for 150 years, would tell in favour of a compromise, rather than of wholesale extermination. Christianity did not come to mitigate the fury of the invaders until the conquest was nearly accomplished; but the method of its introduction into Kent and its immediate success, seem to argue that the ground had been prepared by a continued exercise of the rites of worship in the old church of St. Martin, which was set aside for the use of Aethelberht's Christian Queen. It has even been asserted that Celtic missionaries lent their aid to Augustine and his followers in their labour of conversion. And if continuity can be traced in the language, the religion, and the arts of the days of the Roman occupation, it may well be believed that the Roman organization, both social and political, would not perish. Thus it has been asserted³ that Roman *territoria*, which hypothetically followed the boundaries of the British tribal lands, were presided over by an official called the *comes civitatis*, and that in these are to be found the origin alike of the small kingdoms of the Heptarchic period and, therefore, ultimately of the English *shire*, together with that of the Anglo-Saxon *ealdorman*. But while all this remains no more than mere assertion, some evidence has been adduced in favour of the continued life of lesser organizations, whether the *villa* or private estate, cultivated by a bailiff and servile tenants, or (less conclusively) the *municipium* with its *collegia*, which became the English *burh* with its *gilds*. Under these circumstances it would almost naturally follow that 'Roman law has formed the basis of the Saxon family system, and of the laws of property'; while the only possible conclusion would be with Mr. Pearson that 'the Saxon Conquest . . . did not break up society; it only added a new element to what is found. The Saxon state was built up on the ruins of the past⁴.'

¹ Pearson, *Hist. of Eng.* i. 102.

² Brewer, *English Studies*, pp. 64-74.

³ Scarth, *Roman Britain*, p. 225.

⁴ *Hist. of Eng.* i. 103.

Such are the two diametrically opposite interpretations of

the evidence as to the early history of the country. Is it possible to arrive at a definite conclusion? Perhaps, for the present, the question must be left to the antiquarians, whose material, when collected, it will fall to the lot of the historian to interpret. It is, however, necessary for our immediate purpose to note the precise points of contention between the two rival theories, and thus to indicate the direction in which future evidence may be expected to point. At the outset it may be noticed that the difference between the two schools, which has for the sake of the contrast been just presented stripped of all qualifications, is, by their introduction, considerably and appreciably modified. It is, of course, the extreme theory of the advocates of a purely Teutonic origin which suffers by their introduction. Thus Mr. Freeman acknowledges that 'the literal extirpation of a nation is an impossibility'¹; and all advocates of Teutonic influences allow of the survival among the English of women and slaves of British blood. The cities too, though the destruction was such that in many cases their very sites have passed away, may sometimes have remained in possession of their former inhabitants, but in dependence on their conquerors. It is even not improbable that the greater men made terms for themselves with the invaders; while it is most likely that on the western borderland, where the two races joined, large numbers of the Britons remained mingled with the new comers. There are instances of the existence of patches of country, such as the small kingdom of Elmet or Leeds, which seem to have remained for a while under their old rulers, and to have been only gradually assimilated by the English population in the midst of which they lay; and it has even been conjectured that in places where local industries survived, such as the smelting in the Forest of Dean, and the lead mines of the Peak, the old population of skilled workmen remained and kept up their special organization². Again, despite the general prevalence of Teutonic nomenclature, it is not to be denied that the designations of local features of the country often retained such Celtic forms as *pen*, *dun*, *ock*, *combe*, and *exe*³. None of these admissions would of themselves settle the question against the school of the writers who make them, and who are willing to go even further. It is, perhaps, not wonderful that Roman Britain

Qualifications of the pure Teutonic theory.

¹ *Norm. Cong.* i. p. 18.

² Cunningham, *Eng. Ind. and Com.* i. 62.
³ Green, *Making of England*, p. 138.

should have set the bounds to the settlement of the English, and that thus 'the political structure of its provinces had an influence on the settlement of the invaders, and even the social life as far as it was controlled by roads, boundary marks of estates, and fields'; but the same writer (Mr. J. R. Green) seems almost to surrender his whole position when he acknowledges that 'it was thus that the Roman Vill often became the English township: that the boundaries of its older masters remained the bound marks of the new: that serf and laet took the place of colonus and slave: while the system of cultivation was probably in the case of both peoples sufficiently identical to need little change in field or homestead¹.' The modifications of the theory of pure Teutonic descent are, then, both numerous and important, though it is difficult to meet the summary judgment of a high authority (Dr. Stubbs) 'that all these probabilities only bring out more strongly the improbability of any commixture or amalgamation of the races².'

¹ *Making of England*, p. 148.

² *Const. Hist.* § 28. The early land system as interpreted by (1) the Teutonic School.

³ p. 16.

In passing to the precise points of contention between the rival theories of English origins, it will not be necessary to dwell on what may be described as the older class of arguments, which constitute the bulk of those just given on the side of the Romano-Celtic school of writers; for these are avowedly conjectures unsubstantiated by continuous historical proof, and resting in the main on such striking analogies between the Roman and the English system as might be accounted for by similarity of circumstances. Under this head come the identification of the territoria and the shires, the municipium and the burh, the collegia and the gilds, and the descent of the *trinoda necessitas*—the threefold obligation on every English landowner of repairing the bridges and walls and serving in the local militia from similar duties which lay upon the manorial lords of the Roman occupation. The recently given explanation of folkland, as the land which descends by the custom of the family³, robs it even of all analogy to the *ager publicus*. The arguments drawn from anthropological considerations, such as the study of human skulls found in ancient tombs, are so highly technical, even if the results are not in themselves conflicting, that no apology need be made for omitting them here. It is over *the system of land ownership* that the strife at present rages. Did the English

settle in that system of free village communities which one interpretation of the accounts given by Caesar and Tacitus represents as the basis of their social organization in the German lands whence they came? or did they accept from the inhabitants of the island that manorial system of individual and absolute ownership which was practised by the Romans in all their provinces? Both schools agree that the cultivation of the land was carried on by a common and co-operative method. The question, therefore, may be defined as a dispute *whether it was their freedom or their serfdom that these cultivators possessed in common*. Now, political society is generally acknowledged to have begun in the family. As the sons grew up, they married, and in their turn had families of their own. These families together formed a community, and as their nomad life gave place to fixed habitations, they settled down in a village community, to which, as a method of landownership and cultivation, has been given the name of the *Mark System*. Its features were a supposed common *kinship* among the inhabitants; a common, or rather equal, *ownership* of the land belonging to the community; and the *cultivation* of that land according to a common method. To the head of each family, of whom the governing body of the tribe was formed, there was allotted under this system, besides a separate and permanent dwelling, a definite share with his neighbours in the arable land, which for fairness' sake was annually re-divided, and a proportionate share in the woods and pastures, which were not temporarily divided, but continued to be held in common. Much has been made of the difference in method of cultivation between a two- and a three-field system. In the former, all the lands outside the woods and waste would be divided annually into two; in the latter, into three great portions. Of these, in the rudimentary agriculture of the time, each portion would in rotation be suffered to lie fallow: the one or the two remaining portions would be annually redistributed among the cultivators, who would be bound, each on his own share, to grow a certain kind of crops. The three-field may denote a more advanced stage of agriculture than the two-field system, in that it gives scope for a more extensive rotation of crops; but much may be accounted for by the difference of circumstances and of soil.

(2) The
Romano-
Celtic
School.

¹ Stubbs,
*Const.
Hist.* § 19.

² *Recher-
ches sur
quelques
problèmes
d'histoire*,
pp. 322-
340.

Such is the social system out of which a few enthusiasts have endeavoured to develop the whole of the early English Constitution. More moderate writers of the same school, who equally believe in it as a social basis common to the whole of the so-called Aryan race whether in Europe or in Asia, point out that, inasmuch as the development of many nations which began with the same system, has, in the course of their history, been arrested, and they themselves have been reduced to insignificance, the social life of the English could not have been based on the mark system alone¹. Indeed, it was merely an agricultural system, and the equality which underlay it would naturally disappear with the frequency of inter-tribal war and the resulting opportunities of acquisition and the satisfaction of ambition. The advocates of the continued existence of Romano-Celtic influences go further, and *deny the existence of the mark system altogether*. One critic (M. Fustel de Coulanges²), with reference to its elaboration by German writers, has called it 'a figment of the Teutonic imagination,' and has pointed out that there is not a single real instance of the use of the word 'marca' in the sense of landownership by a community. The evidence of Caesar and Tacitus, who furnish the earliest accounts of the Teutonic invaders of Britain, may be interpreted in support of a theory of individual ownership with at least as much plausibility as they have been cited to prove the existence of a system of common ownership as well as common cultivation. The analogies with the village community of India have recently been denied: the parallels from Russia and elsewhere are otherwise explained. As a last refuge, some of the Teutonic school have asserted that the system itself existed, though the application to it of the term 'mark' may have been unwarranted. But even for this final position no room is left, for it is now contended by the opponents that early German law is based on the assumption of private landownership; that the only alternative is the possession of rights by the family, and that the term *common* merely denotes the enjoyment by two or more individual owners. It should be pointed out that, however important may be the place of this question in the discussion of origins, it does not enter very practically into the course of English history; for, 'although traces still remain of common land tenure at the opening of

Anglo-Saxon history, absolute ownership of land in severalty was established and becoming the rule.' (Dr. Stubbs¹.)

¹ *Const. Hist.* § 36.

The argument for individual ownership at the very outset of English history, rests upon two further propositions. That, so far as evidence carries us, *the system of cultivation during the Roman occupation of Britain was manorial* is, with reservations, admitted on all hands. In other words, the Roman *villa* was an estate belonging to an individual owner, who probably cultivated it by a villicus or steward, through the medium of coloni, semi-servile cultivators of small plots of their own, and servi, who were absolutely at the lord's disposal. It must further be premised that the English accepted the system of ownership and cultivation which they found established in the island. Such a supposition is possible only on the theory of a large Romano-Celtic survival. Now, in addition to the arguments already given in disproof of the theory of extermination, it should be noticed that the Welsh poets who chronicle the invasion, complain that 'a race of Romanized Britons whom they call Loegrians took part with the invaders against their Keltic kinsmen?.' But the real connecting link between the old inhabitants and their new conquerors is supposed to have been made by a pre-existing, but purely hypothetical, Teutonic population whom the Romans, in pursuance of their common policy, deported into Britain and, despite the flat denial of Dr. Stubbs, settled in the south-eastern portion of the island. These would be likely to welcome the invaders and impart to them the civilization they had already learnt. If together with these Teutons is reckoned the Celtic population which survived in the cities and even in a servile condition in the country, it will be seen that there were ample means through which the social organization of the old inhabitants could be impressed upon their conquerors; while, if the accounts of Caesar and Tacitus are pressed into the service as witnesses to the existence of individual property among the Saxon tribes, the organization of the old and the new elements of the population would not in principle be appreciably different.

Means of transmitting Roman and Celtic influences.

² Pearson, *Hist. of Eng.* i. 100.

But it is impossible in the present state of knowledge to decide definitely in favour of one or other of these two rival theories. We have seen how many important admissions and

Conclusions.

qualifications even the most ardent supporters of the theory of pure Teutonic origin are willing to make. It must be noted on the other side, that so integral a factor of the manorial system as the enjoyment by the lord of private jurisdiction is still unaccounted for on the supposition of a continuous existence of the Roman villa; and it is pointed out by one of the most strenuous advocates of Roman survivals (Prof. W. J. Ashley) that although 'the main features of the later manorial system were of Roman origin . . . it does not follow that every later manor represents a Roman villa, or that all the Roman estates had the extent of the manors which now represent them'.¹ The same writer most opportunely notes that 'one of the most unfortunate consequences of the mark theory has been to create a vague impression that any condition lower than absolute freedom was altogether exceptional in early English society.' Indeed, freedom is an altogether relative term; the Roman *colonus*, the Saxon *ceorl*, and the Norman *villan* were all bound by certain obligations, while they were protected by certain rights which, though enforced chiefly by moral sanction, were none the less effective in guaranteeing them against the tyranny of their lords.

¹ Introd.
to F. de
Coulanges'
*Origin of
Property
in Land*.

Our immediate wants, then, seem to be a new definition of freedom and, probably, a more careful discrimination between different centuries and different districts. The simplicity and uniformity of the hitherto accepted explanations may be broken up: survivals may be found to be in reality new departures: the course of early English history may fall into line with that of the other parts of Western Europe: the four centuries of Roman occupation may become an important episode in our national history: yet there will be problems enough remaining, such as the comparatively small influence of Roman law and language, which may still give the advocates of pure Teutonism reason and encouragement to hold that English history begins with the landing of Hengist.

THE LAND AND ITS INHABITANTS. 4 part.

CHAPTER I.

THE LAND AND ITS INHABITANTS.

§ 3. DIRECT records of the English Conquest are singularly defective. But the charters and other sources of information which remain, have for the last half century been interpreted as indicating the existence of two modes of land tenure among the Anglo-Saxons. These are contrasted as the land 'held by individuals in full ownership, and that of which the ownership was in the State'.¹ The former was called, generally, *alod*; or was more especially divided into *ethel*, an original allotment, and *bocland* or a gift by charter carved out of the public land. With the increasing use of written records, *ethel* tended to be extinguished in *bocland*. Meanwhile, all the land of the tribe or kingdom which had not been disposed of, remained in the theoretical possession of the folk. This *folkland* could be dealt with in two ways: either subsequent estates of *bocland* could be carved from it by the joint assent of the king and witan; or its temporary occupation could be granted to individuals under the name of *laenland*. Recent investigation, however, has entirely discredited, not this division, but the exact extension of its terms. Thus, while on the one side it has been thought that by the Norman Conquest 'nearly every acre of land in England had become *bocland*' (Kemble²), a recent authority (Sir F. Pollock) believes that this tenure was on the whole 'a luxury confined to great landowners and ecclesiastical corporations',³ and consequently an exceptional tenure. Again, many writers have concurred in noting that besides *folkland* there was another species of tenure, descended from the joint holding of the family, with which all Aryan society is admitted to have begun. To this writers have applied the terms *ethel* (Kemble), *alod* or family land (Mr. H. C. Lodge⁴),

The social system of the Anglo-Saxons.

¹ Stubbs, *Const. Hist.* § 36. Land Tenure.

² *Saxons in England*, i. 306.

³ *The Land Laws*, p. 191.

⁴ *Essays in Anglo-Saxon Law*, p. 68.

and heir-land (Sir F. Pollock), for which, however, there seems to be no warrant. It may be described as an allotment carved out of the family possessions and appropriated by an individual member whether by consent or force. Although the object of the separation would be that the allotment should descend to the heirs of its possessor, the family did not entirely divest itself of all claims. At first the owner had no power over the choice of his heirs: he could not alienate or dispose of the land as he wished, and even for some time after he had gained a power of choice he was limited by the impossibility of leaving it away from the family. Perhaps by the Norman Conquest the claims of the family had passed into a tradition, or at best a mere form. At any rate it seems probable that this was the method under which by that time a large portion of the land was held. It was the customary tenure of early English times; and, with the advent of feudal ideas, it perhaps passed into the superior villenage and copyhold tenure of the manorial system.

Quite recently it seems to have been proved that this is the species of tenure to which the term *folkland* should really be applied. The name is only found technically used three times in Anglo-Saxon documents, and an examination of these shows a contrast, not between public and private, but between family and private land, between, that is, 'the old tenure of family estates under the common law, the folk right, and the new tenure created by privilegia,' i.e. *bocland*. It seems conclusive that, as *bocland* means an estate held by right of book or charter, not one belonging to the charter, so *folkland* indicates an estate, not belonging to the folk, but held by folk-right or customary law, and therefore not in the free disposition of the holder. 'The *folkland*,' says Professor Vinogradoff, to whom this theory is due, 'is what our scholars have called *ethel*, and *alod*, and family land, and *yrfeland* (i.e. heir-land); it is land held under the old restrictive common law, the law which keeps land in families, as contrasted with land which is held under a book, under a privilege, modelled on Roman precedents, expressed in Latin words, armed with ecclesiastical sanctions, and making for free alienation and individualism'.¹ This species of landholding is analogous to the later entailed estates in that the

¹ *Eng. Hist. Rev.* vol. viii. pp. 1-17.

present holder was merely life owner of a property, the disposal of which did not lie with him. The passages, therefore, which are interpreted as implying that the folkland in process of time became the king's demesne, allude not to some far-reaching change in the system of landowning throughout England, but to the fact that the king had procured the assent of the Witan to the conversion of his family land (over which, like any other great thegn, his powers were limited to his lifetime) into an estate in bocland of which he could dispose at will.

Bocland, and perhaps portions of folkland, were subject to the *trinoda necessitas*¹ alone. The great proportion of folk-¹ p. 10.
land must have been liable to customary dues of various kinds whether to the State or the family. The tenants of laenland paid for its use in money, produce or labour. The condition of such tenants would be various, ranging from the holder of an allotment to a substantial farmer. This species of tenure tended in theory to supplant all others, and by the time of the Conquest it must have been the tenure under which a great proportion of the actual cultivators held their land. Liabilities
of Tenures.

The inhabitants under this system may be divided broadly into the two classes of (1) thegns or great landowners, the holders of bocland and larger estates in folkland, and (2) the smaller cultivators, who would fall into several classes according to the degree of independence or the reverse in which they owned or occupied their land. Social
Classes.

Tacitus describes three social grades among the Germanic tribes, and it seems likely that these could be distinguished among the English on their arrival in Britain. But this class division into *Eorls* or nobility by birth, *Ceorls* or non-noble freemen, and *Leets* or slaves, had already been invaded by the rise of a nobility of service which, in the opportunities afforded by the conquest of Britain, would doubtless be fed from the ranks of both bodies of freemen. (Tacitus² noted the existence of the *Comitatus*, a band of free companions with the princeps. ^{Germania,}
c. 13.
When the conquest of Britain had transformed the successful princeps into the king, his comites or *gesiths*, to use the English equivalent, would naturally share in the advance, and would obtain land in the newly conquered territory.) But all the king's *gesiths* were not at once made landowners (a *gesith-*

cund man . . . not owning land,' Sel. Chart. p. 62, § 51), and the distinction seems to have been marked by the introduction of a new term—namely *Thegn*. In its origin this meant a boy or young man, a servant in the royal household as contrasted with a *gesith* or companion, and his prototype has been found in the freedmen described by Tacitus as of importance in the royally governed tribes¹. But the members of the royal household would be more than personal attendants of the king. The minister or *miles*—for by such terms was the word *thegn* rendered in official speech—obtained a grant of land, generally as a reward of service; and in process of time the *thegn*hood became a territorial nobility whose original personal connexion with the king was a vanishing quantity. The results were important. In the first place, the term *thegn* absorbed the old *gesith*, who is henceforth only found as a personal attendant on the king. It absorbed also the more venerable race of *eorls* or blood nobility. The name, however, remained on, sometimes as part of a comprehensive phrase to denote the highest as opposed to the lowest rank of the people, *eorl and ceorl*², sometimes as a convenient and familiar description of the great officials of the Court and nation, the class from whom would be taken the *ealdormen* of the provinces and groups of shires. On the other hand, the class of *thegns* widens and splits into several grades. The term is applied alike to the great *ealdorman*; to the king's *thegns* with a *wergild* of 1,200 shillings and a considerable *heriot*, who was a member of the king's personal council and was amenable to the king's jurisdiction alone in the *thening-manna gemot*; to the ordinary *scir-thegns*, probably described in the term *twyhynde* which denoted a *wergild* of 200 shillings, and to the *ceorl* who, by the acquisition of certain privileges, had thriven to *thegn-right*. The whole class in fact, who after the Norman Conquest appeared under the name of Knights, was probably included in this comprehensive English title; and the resemblance was heightened by a substantial similarity in the territorial qualifications and military duties of the two classes. It nowhere appears that the mere possession of a fixed quantity of land entitled the owner to the rank of a *thegn*, but the frequent mention of five hides in connexion with the *thegn*hood would seem to show that in

¹ *Eng. Hist. Rev.* iv. 723-9.

² *Sel. Chart.* p. 65, § 1, and p. 67, line 4; cf. p. 67, cap. viii. 2, and p. 75, *Cnut's Charter*, line 3.

addition to other qualifications, a thegn would ordinarily need and obtain from a royal grant an endowment of that extent.

The free *Ceorl* of the early English tribes, who in the time of Tacitus was the equal of the very noblest in political rights, and of whom with his equals and their households was formed the free village community, had by the time of the Norman Conquest fallen into two fairly distinct classes according to the degree of independence which he retained. To the law a man was only known in his position of landowner or holder, or as a dependent upon those who were such. The landless and lordless man was an outlaw. But within this limit there was considerable freedom of action. Circumstances had practically made it necessary that the small landowner, the possessor of folkland, should commend or put himself under the protection of some great thegn; but the choice of his lord lay with himself. He could, in the quaint expression of Domesday, 'go where he would with his land.' Commendation was thus a voluntary act, in no way involving anything like a feudal tenure of land. Indeed, it seems probable that it did not affect the land at all. It only necessarily involved attendance at the lord's private court, for the lord would be willing to give his protection in return for the fees and fines of litigation. It seems impossible to believe, with one high authority, that 'a free man might be personally commended to one lord and owe suit of court to another' (Sir F. Pollock¹). A larger class would perhaps be composed of the holders of laenland. These men were free in so far as they could choose their lord, they could go whither they would, but not with the land, for they had none of their own.

Non-noble
Freemen.

*Oxford
Lectures,
p. 123.*

Below these two classes would come the *Unfree*, falling also into two subdivisions, namely the dependent holder who could not quit the land without the lord's consent, and the mere thrall or household slave, who, despite the efforts of the Church and the ordinances of kings, formed a considerable class before the Conquest, and afterwards still remained, though probably in diminished numbers.

§ 4. It was to a society of this amorphous type that the Norman Conquest brought the idea of the FEUDAL SYSTEM and the hand of the systematic and defining lawyer. *Feudalism* may perhaps best be described as *the organization of society for*

The Feudal
Hierarchy.

the two primary and primitive needs of war and justice, based upon the tenure of land, and held together by an elaborate system of private contract. The weaker contracted with the stronger for protection, in return for which he attended his protector both to the camp and in the law-court. This contractual relation might extend through almost any number of steps; and thus was created a graduated series of lords and tenants, starting from the villan who was lord of no man and free in relation to every one except his lord, and ending with the king, in whom alone resided the absolute dominion of the land as opposed to the occupation or possession of his tenants. The feudal scheme was, therefore, briefly, as follows:—Outside the king's demesne or private property of the crown, all land was held by grant from the king and on condition of services of various kinds. We may set aside the tenure of *Frankalmoigne* (in libera elemosyna, or in free alms) by which religious houses held a portion of their possessions, and which before the Conquest was liable to the *trinoda necessitas* alone, and after the Conquest to spiritual service, such as the saying of masses for the souls of the grantor and his kin; and we may also set aside such rare tenures as *Grand* and *Petit Serjeanty* (per magnum aut parvum servitium), which involved the performance of services which would have been considered degrading for a freeman had they not been rendered to the king in person, from the duties of Grand Butler down to the obligation to render some small material thing, such as a spear. With these exceptions, then, it is true to say that the whole land was held from the king on condition of military service, and the holders were known as *Tenants-in-chief* (tenentes in capite). On the king's demesne were to be found socage or non-military free tenants, and even villans or unfree tenants, who, because they belonged to the king either now or at some period before the Norman Conquest, enjoyed especial privileges and were liable to especial duties. These were called *Tenants in Ancient Demesne*, a term which after the Conquest was applied to the possessions of the Crown under Edward the Confessor. It was an accident that in their case the intermediate steps in the feudal hierarchy had been missed. The tenants-in-chief fell soon after the Conquest into two fairly distinct classes¹, which were recognized and emphasized by the arrangements of the constitution. The *Greater*

¹ cf. pp.
105-6.

Barons (majores barones) were those who were entitled to a special summons to council or camp, and who paid their feudal dues direct to the Exchequer. The *Lesser Barons* (minores) found the Sheriff the appointed medium of communication between themselves and the crown. To him they paid their feudal dues, through him they received their summons, and under him they mustered, until the payment of scutage relieved them from the burden of personal attendance in the feudal levy. They were, in fact, the owners of little more than a single knight's fee, while the Greater Barons had probably agreed with the crown for the maintenance, or at least the supply, of a whole troop. The difficulties connected with the question of the Knight's Fee are stated elsewhere : at present Chap. ix. it is important to remark that this knightly tenure was one which the crown enjoyed in common with its own tenants-in-chief, and their tenants perhaps for several grades. Thus the tenants-in-chief, by a process called *subinfeudation*, granted out such land as they did not keep in their own demesne to persons of knightly rank who should hold from them on condition of military service. In this way new manors or units of social life were being continually created, until such creation was practically checked in 1290 by the statute commonly called *Quia Emptores*. It is with reference to these tenants that tenants-in-chief, and such of their own tenants as repeated the process, were called *mesne lords*, and their tenants *mesne tenants*. We thus get a perfectly regulated gradation of the crown, the tenants-in-chief or mesne lords, and mesne tenants, each possessed of one or more manors, and exercising in virtue of that possession functions of justice and police which, when unchecked, as they were abroad in Normandy or in England in the days of Stephen, reached very formidable dimensions.

To such an organization, whether we believe in the early existence of the manor or not, things had at any rate been tending in the later Saxon times ; but the old personal obligations, which dated from a period when land was not the basis, though perhaps a badge of freedom, were never lost sight of. Even after the coming of William it needed a century of 'the general and uniform jurisdiction of the king's courts' to bring the social and territorial system of England into thorough conformity with the principles of Feudalism. It was during the same

Its immediate effects on the English land system.

century that the energies of the stronger kings were directed to checking the growth of feudal doctrines in the conduct of the government. But almost immediately the efforts of the Norman lawyers took effect in two directions. On the one hand, the numerous English tenures were reduced to *a few uniform types*, and the varying customary rights were interpreted by a few simple rules. Thus folkland became in name what it had long been in reality—the lord's demesne; and the tenants of laenland, while gaining a permanent tenure for themselves and their heirs, were ranked among the villans of the manorial system; and although the monasteries remained practically undisturbed in their possessions, the private owners of bocland found their estates confiscated, or at best were compelled to take up the position of free but dependent feudal non-military tenants. This tendency to simplification and uniformity of outward form was much assisted by the feudal theory that all land was in some one's manor, for even towns were regarded as forming part of a lord's demesne: and it was a strictly logical conclusion that a commended freeman held his land of the lord at whose court he did suit and service. The second immediate effect of the introduction of Feudalism was the establishment of *Primogeniture*. Under the Anglo-Saxons it is probable that wills (or in the legal phrase, 'alienation post mortem' as distinguished from 'alienation inter vivos,' or the disposal of property by sale or gift during lifetime) were only common to the owners of great estates in bocland. Folkland, as a rule, descended to all the sons equally by the custom of gavelkind, though there were exceptions in favour both of the eldest son, and even of the youngest by a rule of descent known as Borough English. It is easy to understand how, in the military tenures of the feudal system, primogeniture was necessarily a rule of exclusive succession. Even 'where the feudal rules did allow division as in the case of female co-heirs, an exception was made in the case of a chief place of arms or castle, for the avowed reason of military necessity' (Sir F. Pollock¹). The non-military tenures retained for some time the old Saxon modes of descent; but gradually here too decisions of the king's court tended to make Primogeniture the exclusive rule, though there were local exceptions, gavelkind surviving for some unexplained reason in Kent, and Borough English in many towns.

(1) Simplification of Tenures.

(2) Primogeniture.

¹ *Land Laws*, p. 56.

But the policy of the English kings to allow and encourage a feudal state of society while they did all in their power to suppress feudal influences in government, involving as it did 'the mitigation or omission of the essentially military features' of that system, could not but change the fundamental working of Feudalism. Increasing stress was laid upon duties to be discharged from the land rather than on the actual individuals who were to discharge them; and the whole system was regarded by the king and the lords as an easy method of raising revenue. Thus, while on the one side all obligations could be interpreted in terms of money, whether it was the military service of the knights, the fixed duty of the free non-military tenant, or even the more precarious liabilities of the unfree holder; at the same time there came about a serious and far-reaching severance of the tenure of land from the personal condition of the tenant. For example, a freeman could, without suffering any diminution of his freedom, occupy land whose liabilities were accounted servile, and even an unfree tenant could become a freeholder unchallenged by any except his lord.

Its ultimate effect—
divorce of
tenure from
personal
condition.

The result was that the position of a feudal tenant passed from 'a kind of military occupation of the land on special duty,' to 'a complicated form of ownership subject to periodical and occasional burdens, which having lost their original purpose, appeared as meaningless as they were vexatious'.¹ But these burdens, or, as they are generally styled, the Incidents of (i.e. things incident to) feudal tenure, were by no means peculiar to the feudal system. Many are found existing in England in a modified form long before the Norman Conquest. The only effect of the feudal ideas was to put them on a slightly different basis, to multiply and, at the same time, to systematize them. They applied, as will be seen, in different degrees to different classes of tenure, and seem to have been levied from villan as well as free tenants. The object of the lords was to stretch these incidents as far as possible: that of the tenants, on the contrary, was to get them defined. These obligations were—

¹ *Land Laws*, p. 59.

Incidents of
Feudal
tenure.

(a) *Military service*, by which the tenant was bound originally to attend in person, but later to supply a fully-armed warrior, at first whenever the lord took the field and for as long as he required; but very early the obligation was limited to a service

(1) Obligations.

of forty days at a time. This obligation lay upon all holding by knightly tenure (*per militiam*, or by the *hauberk*), though scutage early enabled many such holders to commute it for a sum of money; and apparently upon some of the so-called non-military tenants in socage.

(b) Payments of two kinds:—

(1) *Reliefs*. The heir of a king's thegn in early English times had been liable for a payment called a *Heriot*, which in theory was the return to the lord of the horse and arms with which the lord had equipped the lately-deceased thegn, by the heir who had entered on the estate. It implied a personal connexion between the lord and the late tenant, which might or might not be renewed with his successor. The Relief, on the other hand, represented the feudal idea that no grant of land was made by the lord for more than the lifetime of a tenant, and that therefore, on the appointment of the heir of the dead man, the heir paid a sum of money as a present to the lord, acknowledging that he did not succeed by hereditary right, but by favour of the lord. Thus, whereas before the Conquest the heir succeeded naturally to the possessions of his ancestor, he could not under feudal tenure obtain *livery of seisin* or enter on his land until the relief had been paid. The arbitrary exaction of relief by William II caused the insertion of a clause (§ 2) in the Charter of Liberties issued by Henry I¹ on his accession, to the effect that reliefs should be just and lawful both on the part of the king and on that of other overlords. Under Henry II², while for the great lords it was still a matter of bargain with the king, the sum payable by the owner of a knight's fee had become fixed at 100 shillings, and a socage tenant was liable for a whole year's rent of his land. But by Magna Carta (§ 2)³, while the old reliefs were confirmed, that for an Earl or Baron was fixed at £100. *

¹ Stubbs, *Select Charters*, p. 100.

² *Ibid.* p. 163, c. 4.

³ *Ibid.* p. 297.

(2) *Aids*. In feudal theory the vassal, as giving his personal service, was free from general taxation; but the close relation which was supposed to exist between the lord and his man, justified the former in demanding and the tenant in affording pecuniary aid on special occasions. Such aid soon became limited to three occasions—the ransoming of the lord from captivity, the knighting of his eldest son, and the marriage of his eldest daughter. The amount payable for the first of these

three must presumably have depended upon circumstances ; in the case of Richard I the crown vassals were called upon for an aid at the rate of a scutage, i. e. 20 shillings on the knight's fee ; and this same amount was fixed by the statute of Westminster I¹ in 1275 (3 Ed. I, c. 36) for the latter two ¹*Sel. Chart.* occasions in the case of owners of a knight's fee or of £20 ^{P. 450.} worth of land in socage tenure, and was extended in 1351 (25 Ed. III, st. 5, c. 11) to tenants-in-chief.

But the settlement of these aids as legitimate both in occasion and amount, did not preclude the demand by lords of irregular aids for special purposes such as the payment of a debt. Magna Carta (§ 12)² provided that no scutage or aid ³ *Ibid.* pp. except the three regular aids should be imposed except by ^{298-9.} the Commune Concilium, and that such aids should be reasonable, while (§ 15) it forbade *mesne* lords (i. e. tenants of another lord having tenants under them) to exact any at all except the three regular aids. The Confirmatio Cartarum³ of ³ *Ibid.* 1297 (§ 6) again forbade illegal aids, but without much im- ^{P. 495.} mediate effect. All aids on a feudal basis, both regular and irregular, sank into disuse with the decay of the feudal system, though they were not finally abolished until the abolition of feudal tenures under Charles II.

These feudal aids, which, like reliefs, were paid by all holding feudal relations (i. e. by every tenant to every lord), are to be distinguished from other *auxilia*, of which mention is occasionally found in the reigns of the early Plantagenets, and which were taxes formally granted to the king by the Commune Concilium.

There were, however, two payments of a feudal kind which the king contrived to enforce and to appropriate, without allowing the other lords to share them. Such were (i) *Primer Seisin*, or the right of exacting from the heir of a tenant-in-chief, on his coming of age, an additional relief of one year's profits of the land ; and (ii) *Fines for alienation*, or payment by a tenant-in-chief for the privilege of disposing of part of his land in his lifetime.

(c) The rights of *Wardship and Marriage*.

(2) Rights.

(1) *Wardship*. As it had existed in early English days, this had been the duty of protection exercised by the head of the kin over the rights of the heir, which it was the business

of the whole community to maintain. But with the feudal idea of the re-entry of the lord on the lands at the tenant's death until the heir had paid the relief, the lord enjoyed the profits of the estate during a minority, which in the case of an heir lasted till he was twenty-one, and in that of a female till fourteen. Meanwhile, the lord was also entitled to the wardship of the minor's person. On attaining his legal age the heir had to 'sue out his livery' (i. e. sue for the delivery of his land from the custody of the guardian) by a process called *ouster le main*, which involved the payment of half-a-year's profit, but exempted the payer from relief or primer seisin. The land was then made over to the heir, but without any account being rendered for its profits in the interval. Wardship, together with marriage, was perhaps the most fruitful source of feudal oppression.

¹ *Sel. Chart.* Its misuse by William II caused Henry I in his charter (§ 4) ¹
p. 101.

² *Ibid.* p. to pronounce its abolition by making the widow or next-of-kin
^{151.} guardian of the land and children, thus assimilating it to the rule in the case of socage lands. The Assize of Northampton ²

(1176, § 4), however, expressly gives it to the lord, though Magna Carta (§§ 4 and 5) ³ provides that the guardians should only
^{297.} take just and fair profits, and should not abuse their trust.

In the case of *socage* tenants the rules of guardianship were far more equitable: the guardian was the next-of-kin among those who could not inherit; his compulsory supervision lasted only to the age of fourteen, when the heir could choose his own guardian for the remainder of his minority; and, above all, the guardian was accountable for his administration of the property. On the abolition of military tenures these became the ordinary rules, with the statutable addition that the father could choose the guardians of his heir's minority.

(2) *Marriage*. This was at first simply the lord's right of preventing the daughter and heiress of his tenant from marrying so that the military duty from the estate could not be performed. But it speedily developed into the absolute right of the lord to dispose of his female ward unless she paid a considerable fine, which was enormously increased if she married without his consent. A considerable sum could thus be raised by the suggestion of a series of unacceptable suitors. In the time of Henry III this right was extended to include the marriage of eldest sons who were minors.

(d) The reversion of the land to the lord through *Forfeiture* (3) Ultimate possession.
or *Escheat*.

It has been pointed out that the feudal system was based upon a contract whereby the tenant undertook to perform certain services in return for a grant of land. The estate reverted to the lord on the failure of the tenant to perform his portion of the contract, whether deliberately by rebellion, when his treason corrupted his blood and rendered his heirs incapable of inheriting; or by failure to leave a suitable heir to perform the duties due from the estate. The lawyers drew a distinction between a Reversion and a Remainder. When a tenant in fee-simple granted an estate for life or in tail, he might at the same time grant away the fee-simple or ultimate possession, and the interest in the land of the new owner of the fee-simple was called a Remainder; if, on the other hand, the grantor retained the ultimate possession, his interest was called a Reversion.

To sum up:—A *tenant-in-chief* or landowner holding immediately of the king by knight service, was liable for all the charges enumerated above: a *sub-tenant* holding on condition of military service, came under all except the two especially appropriated by the king—primer seisin and fines on alienation: a *socage* or non-military free tenant paid a relief of a year's rent, primer seisin if he held of the king, and aids for knighthood and marriage, and his land was liable to escheat. Even the tenants in *villenage*, who had their own special liabilities to tallage and other dues, are found burdened with a payment on the succession to their holdings, which sometimes took the form of the heriot, as being the surrender of a large portion of their chattels, presumably furnished by the lord, and sometimes approached more nearly to the pure succession-duty or relief of the usual value of a year's rent. Summary of liabilities.

Thus the whole country was parcelled out into manors and sub-manors, the holders of each of which enjoyed certain important privileges and incurred more or less fixed liabilities. Since, for many generations to come, the population of England was almost entirely agricultural, a description of the arrangements and inhabitants of one typical manor will give a sufficient idea of the chief classes which formed the population of mediæval England.

The
Manor.

§ 5. The MANOR under the feudal system may be regarded either as an agricultural and social, or a judicial unit. The debated question of the manorial courts is dealt with elsewhere: for the present it is enough to treat of the two former, the social and agricultural aspect of the manor. As an agricultural community, then, all the arrangements of the manor were directed towards supplying the lord's demesne with labour for its cultivation. The principle of common cultivation, whether it be the relic of freedom or of slavery, still existed, that is, cultivation by co-operation and in accordance with a common system. Thus all who took part in it, including the lord and the priest, held their share of land scattered up and down in strips of varying but roughly uniform size over the whole arable portion of the estate; while they turned out their cattle into the pasture and their pigs into the woods, in number regulated in strict proportion to the size of their holdings. From these restrictions even the lord, despite the lawyer's fictions of his absolute authority, does not seem to have been free. The object, of course, was to maintain an equality between similar classes of tenants and to ensure a correspondence between the size of the holdings and the services due from them; but it has been suggested¹, in view of the apparent actual dissimilarity in the amount, that the principle of this equality was agrarian, the statutable size varying with the nature of the ground, and quality not quantity being thus the motive of division. Or it may be that, for purposes of distribution of rents and services, the holdings were reduced to an artificial uniformity; for a considerable difference is found, where comparison is possible, between the rateable and the actual size. Yet, notwithstanding this universal amenability to a common system, the lands of the manor fall under three fairly definite heads, and obtain a character, as has already been described², apart from the personal condition of the individual holder.

¹ Vinogradoff, *Villainage in England*, p. 240.

² p. 23.

The lord's
demesne.

The manorial community centred in the *lord's demesne*, which, although separate portions are found, consisted for the most part of strips intermixed with those of the community, following the common course of husbandry, and, like the other holdings, thrown after harvest into the open fields for pasture. In those parts of England, like Northumbria and East Anglia, where the power of the lord was political rather than on an

economic or agrarian basis, manors are found without any demesne, or rather, perhaps, in the personal absence of the lord the demesne was let at a fixed annual payment to an individual tenant, or to the whole body of occupying tenants, whose services had of course been commuted for sums of money.

The affairs of the demesne and of the manor generally were regulated by a series of officers with fixed duties. (1) Over all the manors of a lord would be set a *Seneschal* or steward, generally a lawyer, who combined the functions of a land-agent and a judge or president of the courts. (2) To each manor there would be a *Bailiff* or beadle, an outsider appointed by the lord, who would watch his interests, collect the numerous and petty labour rents, and attend the neighbouring market to sell produce and buy stock. These functions were often undertaken at a fixed rent, and gained for their performer the name of *firmarius*. (3) In each manor also there would be a *Reeve*, or *præpositus*, nominated from among the peasants, mostly at their own choice, and in any case the representative of their interests. His responsibility for the due performance of the villans' services made it an undesirable office; and the duty of serving in this capacity became obligatory on every holder of a certain small quantity of land, and thus came to be regarded as a mark of servile tenure. Below these three individuals were ranged three classes of officials, who need little more than mere mention. These were (a) economic, such as the head reaper and shepherd; (b) judicial, like summoners and servers of writs; and (c) domestic, who would be drawn from the growing surplus population. Such of these three classes as were foremen and responsible servants, would be paid by a remission of the liabilities, whether in work or money, which were due from their holdings. The influence of such responsible positions often enabled their holders, in course of time, to gain a footing among the free tenants of the manor.

A second portion of the manor consisted of the *holdings of the free tenants*. Below the tenants-in-chief and feudal sub-tenants, Domesday records the existence of 12,000 *liberi homines* or freeholders, and 23,000 *sochemanni* or socmen. These two classes are found almost exclusively in the east and south-east, and are undoubtedly connected with the Danish invasions. The difference between them may have been that, while the

liberi homines held by charter, custom alone was the security of the socmen; but, whatever it was, the distinction soon disappeared, and the two names were applied indiscriminately to the same class. The word Socmen, however, which came into common use, is found with two important qualifications attached. *Free* are sometimes contrasted with *Bond Socmen*, and while the former pay rent, the latter still do service. The origin of the former has been found in the English holders of the so-called alod or ethel, now more preferably to be called folkland, who had commended themselves to a lord and were by the Norman lawyers converted into free non-military tenants. But the duties demanded of them are both so trifling and various, and yet so disproportionate to the size of the holdings, that another explanation of their origin has been found in the voluntary submission of the equally sharing members of a free village community to a lord, who had superimposed the manorial structure on them. However that may be—and the regularity which is alleged to underlie this outward inequality has been made to point either way—the free socmen were large landowners whose holdings might even be detached economically from the manor, and cultivated by their own villan tenants. The *Bond Socmen*, on the other hand, owned small holdings scattered among the common fields, and they differed little in position from the villans. They probably sprang from Danish followers (the ‘bonder’ was a Danish freeman) who, having been substituted for English ceorls, had not submitted to the servile duties rendered by their predecessors. The services which these humbler socmen owed, were personal and due at times of special pressure, such as the harvest; and their land, in common with that of the whole class whose name they share, was until the thirteenth century subject to the custom of gavelkind, i. e. it descended to all the sons equally. It has, however, been pointed out¹ that the subdivision was often checked by the necessity of keeping together the cattle used for tillage, and thus the heirs often joined together holding definite but undivided shares. ‘There is no villenage in Kent’ became a legal commonplace; but this was only an unaccountable survival, for in Domesday the neighbouring counties differed in no whit from Kent.

But the impulse in favour of freedom was greater than that

¹ *Vill. in Eng.* p. 251.

in the contrary direction. Lawyers might retain and even fortify the fiction of the 'will of the lord'; but that will became so hedged in by custom, that the lord's chief endeavour seems to have been to apply it in directions where as yet no custom had grown up. Thus, while it was equally a matter of convenience and interest to the lord and the tenants that (a) *personal services should be commuted*, first for payment in kind or produce and then for an annual sum of money, it was by the act of the lord alone that (b) *portions were carved out of the demesne* and let from the first at money rents, often to servants occupied in the administration of the manor, or that (c) *portions of the waste land* (called *terra essarta*), whose enclosure nominally required the consent of the body of villagers, were treated in similar fashion. In all these three ways there arose a class of tenants who, so long as they paid the stipulated rents, practically held perpetual leases of their land; and as the payment of rent easily came to be regarded as a test of freedom, their position passed beyond the region of doubt. But this was an insufficient test; for, as commutation became more general, there arose a class of customary or copyhold tenants, who, despite their payment of rent, retained a servile status. Thus a difference in quality or kind gave place to a difference in the quantity of services rendered, and the test of freedom was found in the certainty of the liabilities as contrasted with the uncertainty of those of servile holders.

Growth
of free
tenants.

Test of
freedom.

There is, perhaps, no portion of our subject on which it is so difficult to arrive at the truth, as the actual position of the *unfree feudal tenant*—that successor of the Saxon ceorl who, as we are often told, was degraded by the Norman lawyers into the unfree Norman villanus, and whose whole position has been thoroughly obscured by the utter discrepancy in the facts as we find them in the manorial rolls, and the theories of all lawyers from Glanvill to Blackstone. In the first place, according to these lawyers, a distinction was to be made between villans *regardant* (i. e. attached to land), and villans *in gross* (i. e. attached to the person of the lord); but this has been conclusively proved¹ to be baseless. The same person might come under both heads according to the connexion in which he was mentioned. Thus a villan *regardant* was a villan in relation to a particular manor, and was a term

Holdings
of the
unfree
tenants.

Legal
theory of
villanage.

¹ *Vill. in
Eng.* pp.
48-55.

used by a lord in proving his claim to the villan's services; while a villan in gross needed no further qualification—he was all that his title implied, and was viewed in no particular aspect. For the villan was attached to the manor as a whole, and not, like the Roman colonus, to a particular plot within it; he was thus a personal dependant, though the dependence was enforced through the medium of a territorial lordship. The lawyers, however, set themselves to assimilate his position to that of the colonus in Roman law and fact. In their eyes there was no difference, save in one special case to be noted presently, between one unfree tenant and another. *Servus*, *nativus*, and *villanus* are equivalent terms. They were all rooted to the soil (*ascriptitii glebae*), whence they could not move without the lord's permission, and at the same time their tenure was completely precarious. They held at the will of the lord. A villan had to do whatever he was bid or the lord commanded. 'He knows not to-day,' says Bracton¹, 'what he should do on the morrow': his obligations were without measure. He had no protection against his lord, for the king's court would not interfere so long as the punishments inflicted by the lord did not extend to injury to life or limb. Nor was it possible by any effort of his own to shake himself free from such bondage. Since not only his possessions, but even his very person, belonged to his lord, it was impossible for him

¹ Lib. iv.
cap. 28,
fol. 208.

² *Sel. Chart.*
p. 162.

³ *Vill. in*
Eng. p. 87.

Limitations
to the legal
theory.

⁴ *Sel. Chart.*
p. 140.

to gain his freedom by purchase². He was dependent on the compassionate generosity of strangers, or on the liberality of his lord. But even here we are warned that, while the lord could release his villan from obligations towards himself and his heirs, this did not preclude the claims of another, even if the villan so freed had attained to knightly rank. It has been conjectured³ that this enigmatical statement refers to actual liberation from certain duties and customs which, without raising the status of the villan, would place him in a very different relation to his lord.

And yet even the lawyers acknowledged the existence of certain indirect ways by which the villan could gain his freedom. Residence for a year and a day in a chartered town was perhaps the most common of these. The same effect was produced by the reception of Holy Orders, which the Constitutions of Clarendon (§ xvi)⁴ forbid without the

leave of the lord. And if the lord can free his villan, says Bracton¹, much more can he let him a piece of land by agreement; and a breach of this agreement comes under the cognizance of the king's courts, and can be remedied by the assize. Nor was this all: in numberless ways the law gradually recognized the existence of the villans as members of the commonwealth. Although legally, as we have seen, they could own no property, Magna Carta (§ 20)², for them as well as for freemen, allows certain exemptions from the liabilities to heavy fines; while under Henry III, in 1237³, we find the members of the Commune Concilium granting to the king an income-tax of 8d. in the pound on behalf of themselves and their villans, an unnecessary addition unless the latter had possessions of their own. Again, legally their property, not being their own but their lord's, could be sold in payment of their lord's debts; but it is a lawyer who records⁴ that in the order of such sale the villan's chattels should be taken last. The Assize of Arms under Henry II⁵ (§§ 3 and 12) limits its operation to freemen; but under Henry III we find it extended⁶ so as to include the villan population; for the villans are sworn to arms (1225 and 1252), and their arms are included among that portion of their goods which is exempted from taxation. Finally, they are legally disqualified for attendance at the local courts⁷; but proofs are numerous of their employment on royal business, from the collection of evidence for Domesday to the assessment of Carucage under Richard I in 1198⁸.

But the lawyers have not been alone to blame in the matter of the villan's position. The hasty generalizations of economic writers have made of the villan class the two subdivisions of *villans proper*, the unfree tenants of the common fields of the manor who were responsible for supplying the plough teams by co-operation, and the *bordars* and *cottars*, small holders of a cottage and garden and the performers of the more humble and servile work upon the demesne. This division is convenient, but does not appear to correspond with facts. The bordars, who in Domesday form more than thirty per cent. of the enumerated population (between 70,000 and 80,000), disappear almost entirely from subsequent records; while the cottars, who reached only 5,000 at the same period, never rose in numbers to the dignity of a separate class. The lawyers also

¹ Lib. iv.
cap. 28,
fol. 208.

² Sel. Chart.
p. 299.

³ Ibid.
p. 366.

⁴ Ibid.

p. 237.

⁵ Ibid. pp.

154, 156.

⁶ Ibid. pp.
356, 371.

⁷ Ibid. p.

106, xxix.

⁸ Ibid. pp.

86, 257.

Classes of
villans.

divide the villan tenure into *pure villenage*, of which enough has already been said, and *villan socage*, or privileged villenage, a tenure which only existed on what was or had once been ancient demesne. The occupants of this tenure retained the free personal status which may have been their lot before the Conquest, and they were burdened with services which, though base, were certain; while, though as villans they were not protected in their holdings by the assizes of novel disseisin and mort d'ancestor, yet they had at their disposal peculiar remedies in the 'parvum breve de recto' or 'little writ of right close,' which would even hold against their lord and was defended by the custom of the manor, and the writ of 'Monstraverunt,' which could be pleaded before the king's judges and was a security against an increase of obligations or a change of customs.

Villan
tenure.

The villan class may be dealt with as a whole. The names to denote it are as numerous as the points from which the villan is viewed. They sometimes allude to *status*, such as *servus* and *nativus*; sometimes to *tenure*, as in *villanus* and *rusticus*: more rarely the *nature of the services* gives rise to such descriptions as *operarius* and *customarius*; or the *size of the holding* supplies the form *virgatus* or *yerdling*. As the commutation of services which had begun before the Conquest gives the clue to rare names found in Domesday¹, such as *coliberti* and *censarii*, so the normal holding of the villan, a virgate of thirty acres, explains such expressions as a full and a half villan (*plenarius* aut *dimidius villanus*: half yerdling). The unit of the manorial system was the hide, variously reckoned at 120 to 180 acres, and forming the amount of land which might be cultivated by one normal plough drawn by eight oxen. The number of oxen requisite, as well as the respective size of the individual holdings, would naturally vary with the quality of the soil. But a fourth part of a hide, or a rough measurement of thirty acres, was regarded as the normal holding of the villan tenant. It was on these two units, the hide and the virgate, that all calculations of services were made; and, although the acquisition of villan land by freeholders and vice versâ must necessarily have slightly altered the position of the lord towards the individual holders, the duties remained as a fixed quantity entered in the manorial rolls, and subject

¹ Ashley,
Econ.
Hist., vol.
i. pt. I, p.
22.

neither to increase on the part of the lord nor to substantial diminution on that of the tenant. Indeed, the holding of the villan was theoretically indivisible, and though one son must inherit and be responsible for the services, the families of several sons might remain on their father's plot and help in discharging the obligations¹.

These obligations were of three kinds: (1) *Week-work*, or labour on the lord's demesne for a stated number of days in each week, from the ploughing of the holders of virgates down to the manual duties of the cottars and other humble tenants. Perhaps at first all service liabilities came under the head of week-work; but the socage tenants, and in imitation of them the more successful villans, must have early obtained an exchange of such onerous duties for (2) *Precariae*, or boon-days, i. e. work at times of special pressure. On such occasions the lord generally provided food, of which the amount and kind were regulated by manorial custom. The third kind of obligations consisted of (3) *Gafol* or tribute, fixed payments in money or kind which, though often most minute, reached in the aggregate to a considerable and valuable amount. At first perhaps it would be only the socage tenants who would discharge their obligations by the boon-days; but when labour dues began to be commuted for rents in kind or money, the position of those who paid them began to approximate to that of the freeman. This commutation was a mere matter of calculation on the part of the lord. The unwilling service of the substantial tenant, especially at harvest time, when he required all his labour on his own holding, would exchange to the benefit of the lord for an equivalent rent, and the work of the demesne could be done by the smaller holders and especially by free labourers, whom the creation of free tenancies on the demesne and the waste put at the lord's disposal. Thus the week-work was followed by the boon-days, though perhaps at a considerable interval, and at the beginning of the fourteenth century commutation was becoming general.

But it would be a mistake to suppose that by this means villan tenure was completely, even if not immediately, destroyed. At the beginning of the thirteenth century a change seems to have taken place in the test applied to free tenure, and whereas the payment of rent had been hitherto regarded as the distinctive

¹ *Vill. in Eng.* p. 247. Obligations of villan tenure.

Their commutation.

Origin of Copyhold.

mark, now that every one was beginning to pay rent, it shifted to the impossibility of reverting to the labour services at some future date through the absence of record in the manorial rolls. There thus arose a new species of tenure, rent paying but servile, whose holders were called *Customarii*, in that they held by custom of the manor, and are generally accounted the origin of the copyholders. But a much more ancient and honourable origin has been claimed for this tenure. Copyhold, on which a large proportion of English land was held down to the present century, is literally a holding 'by copy of court roll,' that is, nominally at the will of the lord, whose will, however, is bound to be exercised in accordance with the custom of the manor. The tenant is generally disabled from exercising the rights of an absolute owner, such as cutting timber, and he is liable to many kinds of payments, such as fines on alienation and a heriot on succession. Owing to the power of enfranchisement given by the Copyhold Acts to both lords and tenants, the tenure is now fast dying out. But it is maintained that on the whole 'the modern copyholders are the historical successors of the old English free landholders who had inheritable titles according to local custom (i. e. owners of folkland), evidenced not by writing but by the witness of the neighbours, and paid dues and services originally to the state or community, and afterwards to a lord'.¹ This theory is based upon the contention that the old *villanus* or inhabitant of a vill or township was, at the Conquest and subsequently, a personally free tenant holding land on condition of fixed rents and services, but that he gradually became degraded and confounded with the *nativus* or villan by blood. In Domesday the two are kept separate; under Henry II (Glanvill) there is a confusion, for the serf is 'nativus,' but his condition 'villenagium'; while by the end of Henry III's reign (Bracton) the two words are completely interchangeable.

¹ *Land Laws*, p. 48.

Villan Status.

² p. 32.

So much for villan tenure: it remains to say something of the *personal status of a villan holder*. The nominal extent of the lord's powers over him have been already touched on². He was absolutely at the disposal of the lord; for, although the villan could not leave his land without the lord's permission, the lord could sell the villan though not apart from his holding. Unlike a chattel, he belonged to the manor and formed part of the

freehold. The villan was also liable to sundry heavy payments such as tallage and special aids; and he laboured under many disabilities such as *merchet* or the fine for marrying his daughter, a fine for selling a horse or an ox, and the necessity of serving in his turn as a reeve. But the limitations to the lord's power far outweighed these disadvantages. Although towards the lord alone the villan was in a position of serfdom, yet even as against his lord, as we have seen¹, he was protected from the forfeiture of his wainage or instruments of labour and from injury to life or limb; while the power of the lord in the exaction of his services applied not to the quantity, which was settled and recorded, but to the kind of work which the villan should perform. Moreover, beyond the bounds of the manor and away from the power of the lord the influences which made for freedom were irresistibly strong. Not only was there considerable migration, despite regulations to limit it and the exaction of a poll-tax (*chevagium*) by the lord in maintenance of his claim, but away from the manor a villan was treated as a freeman, so long as his servile status had not been proved. And the procedure in such trials was also favourable to liberty; for the only proof accepted was the acknowledged servile status of the ancestors of the person claimed. We have seen how the law recognized the villan². But, from the first, the criminal law² p. 32. practically made no distinction between free and unfree classes. The extant pleas of the royal courts scarcely reveal a consciousness or afford a proof of a distinction between the two. There seems to have been some difference in the payment of the Murdrum and in the method of Ordeal; but both these disappeared early in the thirteenth century. On the other hand, villans, as well as freemen, could use the royal courts to gain redress for injuries: the frankpledge, an essentially free institution in idea and origin, came to be composed chiefly of villans, who through its agency became connected with the Sheriffs' Tourn; while the ordinary courts of the Hundred and Shire were attended by a representative body composed of the reeve and four villan tenants.

We are now in a position to understand the full significance of the central fact in the economic history of mediaeval England — namely the Black Death, with its necessary accompaniment, the Peasant Revolt. The success of the villans in commuting

The extinction of villenage.

their services seems, toward the middle of the fourteenth century, to have encouraged those who had not been so successful, to refuse the performance of their services. Even with the customary tenants there was much dissatisfaction at the retention by the lord of liabilities like the merchet and small payments of various kinds to mark their servitude. At such a moment the visitation of the Black Death (1348) swept away an almost incredible proportion of the population, and, in consequence of the resulting rarity and costliness of labour, the lords would no doubt enforce the performance of such services as had not been commuted and the strict payment of all commutation fees, while the legislature by the Statute of Labourers tried to prevent a rise in the wages of free labourers. There is no need to suppose with many writers¹ that the lords attempted to demand the performance of the services which had been commuted. The Peasant Revolt (1381) which followed, was to no small extent fanned by the doctrine, founded on Wycliffe's teaching, that, as it was lawful to withdraw tithes from priests who lived in sin, so 'servants and tenants may withdraw their services and rents from their lords that live openly a cursed life.' The demands of the villans varied from place to place, and the most common of them was, in words, that land should be no more than fourpence an acre; but their real desire was for a free tenure of their land by the abolition of the remaining servile payment exacted by the lord. This explains their attack upon the manorial rolls, rather than the desire to obliterate the records of the services already commuted². The revolt failed immediately, and perhaps even its ultimate success in destroying mediaeval serfdom was not so great as is generally assumed. The Land and Stock lease, by which the lord stocked the land for his tenant in anticipation of the day when he could resume the old methods of cultivation, gave way, after an experiment of some seventy years, to an extension of the system of tenant farming on leases which had already been in vogue. But remnants of villenage were to be found as late as the reign of James I, and methods of common cultivation, whatever their origin, existed in different parts of England down to the beginning of the present century.

Leasehold. The principles of feudalism found no place for the *Lease-*

¹ e. g. Thorold Rogers, *Six Cents. of Work & Wages*, p. 253, and Cunningham, *Eng. Ind. and Com.* i. 357.

² Ashley, *Econ. Hist.*, vol. i. pt. 2, p. 266.

holder ; and thus in legal doctrine 'the relation between the landlord and the tenant is simply a personal contract.' Quite briefly, a leasehold is not *real*, but *personal* estate ; it is governed by the same law as money or merchandise. Thus it is created by no particular act or form of words ; and although it can be disposed of by will, in a case of intestacy its descent is regulated by the laws which would apply to any other class of moveable property. Leaseholds are for varying times. The earliest known instances are on the lands of monasteries at least a century before the Conquest, and were made for two or three lives. A practically similar custom—leases for lives renewable on payment of a fine at the termination of each life concerned, was found on all corporate lands both lay and clerical, until abolished by modern reforms. The more definite system of leases for a fixed term of years is found as early as the thirteenth century, and tended to spread ; while with the general growth of the leasehold system came the commonest modern form of tenancy from year to year, a practically indefinite tenure determinable by either party, formerly at six months', but by recent legislation at a full year's notice. Originally leasehold was of all the most precarious form of tenure. Ejection by the landlord involved merely a breach of contract ; but as early as the thirteenth century remedial actions were invented which gave the evicted leaseholder power to recover possession even from an occupant who had bought the land over his head. Again, the landlord's right of distress, or the power to seize goods on the land in payment or at least security for arrears of rent, has only lately been defined and limited : and the tenant's property in buildings or other fixtures placed at his own expense upon the land, owes its full recognition only to an Act of 1851. The question of compensation to the tenant for his permanent or unexhausted improvements will, no doubt, in the same way in time obtain solution. The Agricultural Holdings Act of 1883 sums up the point reached in these various directions. It provides for a notice of a year from either side for the conclusion of a tenancy, limits the landlord's right of distress to a year's rental in amount, and sanctions compensation for such improvements as are undertaken by the tenant with consent of the landlord.

§ 6. The causes which brought about the commutation of

Yeomen
free-
holders.

¹ Thorold
Rogers,
*Six Cents
of Work &
Wages*,
p. 230.

² 8 Hen.
VI, c. 7.

³ 23 Hen.
VI, c. 14.

services for rents, tended also to reduce the profits of landlord cultivation. It has been reckoned¹ that, as a result of the Black Death and the rise in the price of labour, such profits had sunk from twenty to about four per cent. The landlords sought refuge in the creation of leaseholds. They ceased to be cultivators and became mere rent receivers. But alongside of the leaseholders and copyholders there appears in the fifteenth century a third important class, namely the *yeomen*, who on the whole represent the small freeholders of the feudal manor. The limit of the class may be said to lie between those who were eligible for the magistracy and those who possessed the franchise and were called to serve on juries. A law of 1430² limited the parliamentary franchise to freeholders of the annual value of forty shillings. But the yeomen must have found their way into Parliament; for a law of 1445³ forbids the constituencies to return valetti or esquires as their members. Yet notwithstanding this apparent check, they were popularly regarded as the mainstay of the country. Fortescue, the Lancastrian judge, in a laudatory passage of comparison between England and the continent, draws attention to their flourishing state, and is followed by the social writers of Elizabeth's time. But in the fifteenth and early sixteenth centuries, the store set by English wool on the continent caused the formation of large pasture farms for sheep runs. This led to a diminution of the arable land and the enclosure for the lord's benefit of common lands, proceedings which bore hardly on the villan and the free labourer alike; for they led to the eviction of the former and scarcity of employment for the latter. The freeholders too could not fail to be affected by so great a change, though the rise in prices which followed the discovery of the American mines, affected them less than almost any class; for, while they obtained a greater price for their produce, their labour, supplied as it was by themselves and their families, did not increase in cost. At the same time, the legislature, representing the crown and the landed gentry, did everything in its power to protect them. Small holdings were encouraged and limits placed to the size of an individual flock and, whether these were sufficient cause, the class of yeomen was saved to form the backbone of the Parliamentary party in the Civil War. But their days were numbered. Contemporaries reckoned them as forming one-

sixth of the population of England in the seventeenth century, and at its close their actual numbers were estimated at between 160,000 and 180,000. But they were as a class ignorant and conservative in agricultural habits, and after the Civil War they took no political initiative. Thus they lent no aid to the Revolution of 1688, which paved the way to their extinction. For the Revolution was the victory of the great Whig landowners who, in their hatred of the rising merchant class, took all means of increasing their own wealth. To this end they did everything for the encouragement of agriculture. They offered a bounty on the export of corn; they passed bills through Parliament for the enclosure of common fields, and as individuals they introduced on their estates improved methods of cultivation from Holland. The result was most disastrous to the yeomen¹. The introduction of the factory system destroyed those domestic industries on which they had fallen back in bad times; and the decay of the small country towns, which followed on the consolidation both of industry and of farms, deprived them of their markets. At the same time, they were too poor, if not too ignorant, to take advantage of the improved methods of agriculture, and they were in their poverty bought out from their holdings by great landowners or wealthy founders of new families.

¹ Toynbee,
Indust.
Rev. p. 65.

The mention of enclosures brings us to the important subject of common lands from which the enclosures were made. *Rights of common* were of various kinds; but here we need concern ourselves only with the most important—common of pasture, or the right enjoyed both by freeholders and villans of turning out a certain number of cattle to feed. This might be done either on the waste of the manor, as was most usual, or on the hitherto enclosed hayfields after the hay harvest was gathered. These latter were often called 'Lammas lands' because it was on old Lammas day (August 12) that the enclosures were removed; and the right exercised over them was known later to the law as 'common of shack.' The right of common enjoyed by the freeholders was chiefly of two kinds—(1) common *appendant* or annexed by legal custom to the freehold as part of the manor, and (2) common *appurtenant* or a similar right belonging by definite grant or prescription to a freehold which did not necessarily form part of the manorial system of

Common
Lands.

Legal
theory of
rights of
common.

cultivation. Of these the former would be exercised over both the Lammas lands and the waste, the latter as a general rule over the waste alone. But the villan tenants, and after them the copyholders, enjoyed similar rights of common, extending over both classes of land, though their rights rested merely on the custom of the manor, and were not in connexion with their particular tenements; whereas the freeholders could assert theirs against the lord's encroachments by the assize of novel disseisin in the king's courts. The legal theory of the manor gave the whole estate into the lord's hand subject only to the diminution of such rights as he might have granted away. Thus whether it were freeholders asserting their claim to the Lammas lands, or copyholders turning out cattle upon the waste, it was only by permission of the lord that this could be done. Such permission however, once given, became binding as the common law of the land, and though legally it was only the freeholders who could enforce such rights, they carried with them the interests of the villans, in conjunction with whom in the manorial court the prevailing customs had been defined and enforced. Thus by common law the lord was unable to approve or appropriate commons appendant until the legislative permission of the Statute of Merton (20 Henry III, c. 4) in 1235; although even then he was bound to leave sufficient for the tenants' wants, a point which may have been settled by a jury according to local custom. Nor, again, could he touch commons appurtenant until the Statute of Westminster II (13 Ed. I, c. 46) in 1285, and then only those held by prescriptive right; for the lord could not revoke any definite grant made by himself or his predecessors.

Historical
origin.

But this legal theory of the right of common was historically untrue, and practically unjust. Setting aside the unfortunately recurring question of the Roman origin of the manor in England, it has been strongly asserted that although, on the supposition most favourable to the legal theory, some manors may have sprung from the voluntary dependence on a lord of freemen and freedmen who would accept all privileges at his hands; yet a great many of the manors now or formerly existing represent ancient communities in which, little by little, the authority of the community was engrossed by the most considerable man in it, until he became the lord, and the other

land-holders sank into his dependants (Sir F. Pollock¹); and that the privileges of the former would naturally be modelled on the customs which kept their ground among the latter. Thus whether it is the common system of cultivation, which prevailed on many manors down to the beginning of the present century, or the rights of common enjoyed by the inhabitants of all manors, they equally represent the *imposition of the lord on a free village community*, and his successful encroachment on their primitive rights.

The practical injustice of the legal theory of the origin of common rights is clear from the refusal of the law to consider the claims of any other inhabitants than freeholders or copyholders of the manor, even though the privilege may have been enjoyed unquestioned for an unknown length of time; while it was not until 1836 that the legislature betrayed the least consciousness that the exercise of such rights, as affected by the question of enclosures, concerned any except the lord and, in a less degree, the manorial tenants. But by that time the mischief had gone too far for remedy. The scarcity of labour which resulted from the Black Death and the demand for English wool abroad, helped by the land legislation of Edward I, which, while it prevented the creation of new manors, ensured the rigid entailment of estates, all combined to promote the growth of those large estates of the fifteenth century which threatened, through the practices of *livery* and *maintenance*, to reproduce the worst evils of unmitigated feudalism. The interest of the landowners led them to throw together large tracts of land. Nothing hindered this policy so much as the system of common cultivation; and the abolition of the system necessitated the ejection of the tenants who practised it. These would now be chiefly the remains of the old tenants in villenage or, as they were coming to be called, the customary or copyhold tenants. Under Edward IV the law courts seem to have begun to take cognizance of the rights of the heir of a customary tenant who held a grant of inheritance; but although this is a point of much dispute², it is doubtful whether there was any legal protection until a much later period for the ordinary villan, the succession of whose sons in his holding depended merely upon custom. It has been maintained that the lords could, without incurring legal penalties,

¹ *Land Laws*, p. 41.

² Cf. I. S. Leadam, in *Trans. R. Hist. Soc.* 1892, and *Eng. Hist. Rev.* vol. viii.

throughout the fifteenth century evict all copyholders, and in the early years of the sixteenth century such of them as held no grants. There is evidence even into the reign of Henry VIII of wholesale evictions; nor does the Tudor legislation, which tried to stem the current in the direction of great estates, betray the least consciousness that the practices against which it is aimed were in any sense unlawful. 'They (the Acts of Parliament) lay down that "houses of husbandry" ought to be maintained, on the ground that it is desirable that men should find employment; but they never provide means by which the copyholders could enforce their *legal* rights, if they had any.' (Prof. Ashley¹.)

¹ *Econ. Hist.* vol. i. pt. 2, p. 280.

But although the result of these forcible enclosures was a displacement of large portions of the agricultural population, and was therefore serious as far as it went, yet no great permanent harm was done. The population was not increasing so as to outstrip the means of subsistence; the extraordinary commercial development of Elizabeth's reign gave occupation to the hardier spirits; while the spread of textile industries among the cottage population in the seventeenth century helped to strengthen the position of small holders and tenants of all kinds. But the desire of the landed aristocracy to rival the wealth of the merchants and the consequent encouragement to agriculture of the proffered bounty, caused the landowners to strain every nerve to foster the growth of great estates.

Their effect on (1) the landlords and farmer,

For this purpose, as in the matter of the bounty, recourse was again had to Parliament; and, since commonable rights had now become recognized by the law courts, it needed Acts of the legislature to override them by the legalisation of enclosures. In this way, beginning with the reign of Anne, three million acres of common land were appropriated by the landlords in the eighteenth, and six million more in the early years of the present century. But the growing feeling, possibly of complex origin, that such enclosures were an infringement of the rights of the public and not of the commoners alone, has led to the resistance of them in courts of law and the curtailment of the landlords' powers by Acts of the legislature. Of the details of these nothing need here be said. We need only notice that, meanwhile, the results had been serious in two directions. Despite the greed of the landowners, and despite even the agricultural improvements which they introduced, the population grew so

fast that the importation of corn began, after the middle of the eighteenth century, to exceed the amount exported; in 1773 the liberty to export was curtailed, and in 1814 the bounty on export was abolished.

But the growth of population had an even more serious result for the landed interest. Together with the bounty ^(The Corn Laws.) of five shillings per quarter so long as the home price was not above 48 shillings, the legislature maintained in the interests of the home growers the prohibitive import duties, which had first been imposed after the Restoration, in 1670. But the feeling of the country was in favour of using the import duties for the purpose of maintaining a level price. This was fixed by an Act of 1773, associated with the name of Burke, at 48 shillings, which was increased by the pressure of the farmers in 1791 to 54 shillings, and after the great war in 1815 to 80 shillings, at a price above which the import duties became merely nominal or altogether ceased. But these attempts completely failed; for, while the price of corn during the continental wars of 1792-1815 rose so high that, in order to feed the starving people, Parliament had to offer bounties on importation, for the succeeding decade it fell much below the limit selected by the legislature. In 1828 the idea of a sliding scale, which is attributed to Canning who did not live to carry it into practice, fixed a varying tariff of import duties until the price rose to 73 shillings, when the duty became nominal. But this had no better effect than the previous simpler system; and in 1848 Sir Robert Peel, after one attempt at re-adjustment of the sliding scale, became a convert to the principles of Cobden, and almost with a single Act removed the import duties altogether. Whatever the real cause may be, the schemes of the landed interest to manipulate first the export and then the import duties to its advantage, have redounded to its own confusion. The interest was perhaps a little too much confined to that of the landlords and farmers; for, meanwhile, a second result of the enclosure of the commons had been the rapid impoverishment and severance from the land of the agricultural labourers. We have already noticed the decay of the yeomen. But if the enclosures bore hardly, as undoubtedly they did, upon them, much more were they the cause of suffering to the tenant of a mere cottage and garden.

(2) the
labourers.

¹ *Work &
Wages*,
p. 522.

² *Pol. Sci.
Quart.*
vol. iv.
p. 404.

It has been said (Prof. Thorold Rogers¹) that the most prosperous time for the agricultural labourer since the break up of the manorial system was during the fifteenth century, and in a less degree the first half of the eighteenth century; while the period of his greatest degradation was the first half of the seventeenth and the first quarter of the nineteenth century. But the policy of the landlords in the formation of large sheep farms, the known continuance of villenage, and the record of wholesale evictions, may well make us pause before we assent to the prosperity of the labourer under the Lancastrians; while it has been pointed out (Prof. Ashley²) that, had there been any severe and widespread distress at the beginning of the seventeenth century, it would have coloured such democratic risings as those of the Levellers and others during the Commonwealth. As a matter of fact, the continued existence of commonable rights and the spread of cottage industries already alluded to, must have placed the labourer in a fairly comfortable position; and although the policy of the great landowners of the eighteenth century deprived him of the former, and the growth of the factory system extinguished the latter, the rise in wages consequent on the introduction of improved agricultural methods prevented the real change in the labourer's condition from becoming apparent till towards the close of the century. Then the enormously increased rent and prices went to the benefit of the landlord; and the labourer, hindered from a rise in wages through the vicious action of the old Poor Law, found himself reduced to starvation point, with no means of keeping the cow or the geese which had made up to him for the deficiencies in a weekly wage, and no chance of supplementing his agricultural work by the produce of his loom. At the same time, until 1824 combination was treated as conspiracy, and until 1834 the old Poor Law continued to supplement the wages out of the parochial rates.

The Land
Laws.

§ 7. So far we have investigated the various kinds of tenure and modes of agricultural life, which emanated from the manorial system of the middle ages. It remains to inquire how far the Law modified the conditions of the only species of feudal tenure which at first it recognized, namely that of the freeholders, and in particular, of those who held on condition of military service.

It has already been shown that in the feudal theory a

life grant of an estate was alone possible; and although circumstances and convenience caused the establishment of primogeniture both in custom and law, and ultimately for both military and non-military estates alike, yet the theory was so far observed that inheritance by descent only existed when it was expressly specified in the original grant. Yet even in the case of Freehold Estates of Inheritance the absolute dominion remained with the king, to whom it reverted on the failure of all heirs. The most complete form of ownership which the English feudal law allowed, was that known as an *Estate in Fee Simple*. This was a grant to a man and his heirs general without limitation. It could be created in two ways:—*firstly*, by a process called *Feoffment*, consisting of two essential features—formal delivery of possession, called Livery of Seisin, by means of a clod of earth or some similar token; and the use of a particular form of words, indicating the nature and extent of the grant and the services due for it. The notoriety of the transaction was all-important to guard against disputes whether as to title or to rights. A *second* method by which, as early as the reign of Henry II, an estate in fee simple could be created, was by a *Fine of lands*, of which more will be said in another connexion.

Estates in
Fee Simple
Absolute.
Their crea-
tion.

The great advantage of an estate in fee simple in the eyes of the owner was, among other things, that it need never escheat to the king. Certainly, the acceptance of the feudal theory rendered it impossible to leave land by will; and 'alienation post mortem,' as the lawyers termed it, died out except, as we shall see, indirectly, until it was once more made legally valid, though within limits, in the reign of Henry VIII. But *alienation inter vivos*, or the power of granting away an estate by the holder in his lifetime, was exercised unchecked. Where the whole estate was thus transferred, there was only a substitution of one tenant for another, and not a change of relations between the lord and tenant. But if the holder granted part of his land to a tenant, and thus by subinfeudation created a new sub-manor, the overlord found that his profits from escheat and other feudal rights were diminished; titles became complicated, and his chance of securing the service due from his tenant, depending largely as it did on the behaviour of the sub-tenant over whom

Their alien-
ation.

he had no control, more precarious. The only legal restraint on this subinfeudation was an Article (39) of the second re-issue of the Charter¹, which prohibited a freeman from disposing of so much of his land as would prevent him from doing, with the rest, the service due to the lord. For a tenant-in-chief, the Crown under Henry III established the further restraint of the necessity of a licence for such alienation. But practically from 1217 the efforts of the great lords to curb this freedom met with failure until the land legislation of Edward I, which was all in favour of the great lords and thus incidentally of the king. In 1290 the Statute of Westminster III, which is known from its first words as *Quia Emptores*², enacted that every creation of a new manor by subinfeudation should place the new tenant in the same relation to the chief lord as that occupied by the lord who had enfeoffed him. The Statute applied to Estates in Fee Simple alone, and its immediate effect was to put an end to the creation of new manors, and to give the tenant in fee simple complete ownership in his property, unhampered by the claims of his immediate enfeoffor or lord. This must have been a great economical advance. It has also been suggested that an object of the Statute was to compel owners to be occupiers or at least administrators of their land (Sir F. Pollock³), an intention speedily frustrated by the general introduction of leasehold tenure.

But there was another class of Estates in Fee Simple whose alienation was not so easy. Lands were sometimes given to a man and a limited class of heirs, e.g. the *heirs of his body* or his *heirs male*; in other words, the fee simple was granted to him with a condition attached, viz. that issue should be born to him. If this condition was not fulfilled, the land on the holder's death reverted to the grantor. Thus the power of alienating or disposing of an estate of this kind was limited to the lifetime of the holder or grantee; no interest in it or charge upon it, such as a widow's dower, could be claimed or created; nor, in the event of treason on the part of the holder, could it be legally forfeited. But there were two classes especially interested in breaking through these restraints on the free disposal of the land—the *lawyers* for the fees which came from such transactions, and the *smaller land-owners* who by the free sale could rid themselves of in-

¹ *Sel. Chart.*
p. 346.

² *Ibid.*
p. 478.

³ *Land Laws*,
p. 69.

Estates
in Fee
Simple
Condi-
tional.

cumbrances. During the thirteenth century these classes interpreted such grants as conditional on the birth of issue, which, when it had been fulfilled (even if the issue did not survive), turned the Estate into an Estate in Fee Simple Absolute, of which the grantee could dispose as he liked. This disingenuous interpretation in its turn inflicted wrong in two directions—on the *great lords*, who in the event of the heir's death were cheated out of the reversion; and on the *heirs*, who, despite the intentions of the original grant, found their lawful inheritance with the connivance of the lawyers otherwise disposed of. Consequently, under Edward I in 1285 the barons obtained the Statute of Westminster II, in which it was provided, by the first clause, known as *De Donis Conditionalibus*, that, if a conditional estate had been alienated, the heir could, on the death of the grantee, recover the estate from the person to whom it had been alienated; while, if there was no heir alive, the original grantor or his heir could recover the estate from the holder as if issue had never been born.

The effect of this Statute was to create not only a limited but an inalienable estate; and since it did not pretend to be a fee simple either absolute or conditional, it was regarded as a new species of estate and called a *Fee Tail*, i. e. a fee or estate, *taillé* or cut off from the fee simple and the freedom of disposition which went with it. Thus, whatever happened during the lifetime of the holder of the estate, his heirs were bound to succeed; no disposal of it could bar their claim, for the estate was entailed on them and they were the tenants on tail. 'Such is the legal and only correct meaning of the term entail which nowadays is constantly used to express the far more complicated scheme of modern settlements.' (Sir F. Pollock¹.)

But from the very first this effective check on the power of alienation met with considerable resistance. The inviolability of an entail rendered titles insecure, since an old entail might be proved and no time could bar it. Moreover, not only was the king unable to punish treason by forfeiture of an Estate in Tail, but the smaller landowners, as they became impoverished in the Wars of the Roses, increasingly felt the drawback on the power of free disposition. Thus all classes, except the great landowners in whose behalf the Statute had been passed, were interested in obtaining a relaxation of the practice. The

Estates in
Fee Tail.

¹ *Land
Laws*, p. 66.
Methods of
alienation.

barons, however, were strong enough to keep what they had won ; and only indirectly could the wishes of their tenants or the ingenuity of lawyers break through the hated barrier.

(1) Application of Warranty.

The first method employed for this purpose was the application, within necessary limits, to estates in fee tail of doctrines originally devised for the use of tenants in fee simple. By the doctrine of *Warranty*, which dated back in the case of personal property or chattels to early Teutonic law, a purchaser whose possession was disputed would 'vouch to warranty' the vendor of the article, so that the vendor would be obliged either to defend his title or, if the claimant established his right, to make recompense to the purchaser of the article from him.

¹ *Hist. Law Real Prop.*, 4th ed. p. 80, note.

'In the development of the English law of land the doctrine of warranty was applied mainly to the obligation on the part of the donor of land and his heirs to defend the obligation of the donee and his heirs' (Mr. K. E. Digby ¹) to the extent of giving, if necessary, to the representative of the donee lands of equal value to those of which he had been deprived. (Now, the holder of an estate tail was regarded as the owner of the freehold within the limit of his lifetime ; if he went further and alienated the fee simple, which was legally beyond his power, yet the burden lay with his heirs of establishing their claim by process of law ; while, if the alienation had been accompanied by a warranty, those very persons who on the alienor's death would make a claim, would find themselves bound by their ancestor's action to defend the title of the present holder, or to compensate him, if evicted, with land of equal value. Thus 'it was often possible for the actual possessor of land to give to a purchaser a better title than he had himself,' (Sir F. Pollock ².)

² *Land Laws*, p. 78.

(2) Recoveries.

This same doctrine of Warranty was again brought into use in a more effectual method of 'barring an entail,' which was established in the fifteenth century. A friend in collusion with the tenant in tail would bring an action against such tenant for the recovery of the freehold, of which he would himself claim to be the true possessor. The tenant in tail would have recourse to another friend, whom he would vouch to warranty as the pretended donor or heir of the donor of the estate in tail. After some further forms, which need not here be specified, the second friend, representing the original donor,

would disappear; judgment would go against him by default, and the lands would be awarded in fee simple to the first friend, who would convey them to the former tenant in tail as an estate in fee simple. This elaborate process was called a *Common Recovery*, and its applicability to estates in fee tail is generally, though questionably (Sir F. Pollock¹), agreed to have¹ *Land Laws*, p. 83, note. been established by the case of *Taltarum* in 1472, whence it lasted as a mere matter of form until an alteration of the law in 1833. Two important points remain: the only claim to compensation which the dispossessed heirs of the tenant in tail might have, would be against the second friend who had been vouched to warranty, who in the eyes of the law would have to provide for the heirs lands of equal value with those of which they had been dispossessed. This was a serious liability; but it was practically nullified by the customary selection of a humble official of the court to play the part required. Meanwhile, there was no legal guarantee that the first friend, who by decision of the court was the owner of the fee simple, would fulfil his part in the understanding and dispose of those lands at the will of the original tenant in tail. But by the end of the fifteenth century the dictates of honour had given way to the jurisdiction of the Chancellor; and the elaborate ingenuity of attorneys gradually made such double dealing impossible.

A third method of 'barring an entail' was by the use of (3) *Fines*. a process already noted as a means of the creation of an estate in fee simple, viz. a *Fine of Lands*. (This was also a collusive suit, but differed from a Recovery both in being an action not pursued to judgment, but compromised by the defendant abandoning his claim, and in its less complete and effective barring of all possible claims. The effect of the process was to bar the claim of all who did not urge it within a year and a day. It was abolished under Edward III, but restored under Henry VII in the Statute of Fines², with an³ ⁴ *Hen.* extension of time to five years. Its application, however, to the case of tenants in tail was not definitely allowed until 1541 (32 Henry VIII, c. 36). The process was finally abolished, together with that of Recoveries, by the Act of 1833³, by which³ ³ ⁴ *Will. IV.* a tenant in tail can, by the simple enrollment of a deed in Chancery, make himself or any one else a tenant in fee simple. c. 74.

Uses.

The attempt to make an estate inviolable had thus broken down before the ingenuity of the lawyers, and it was necessary for the great landowners, whether sole or corporate, to defend their property from legal liabilities, by the discovery of some more subtle means of evading the Common Law. This was found in a method borrowed from the Roman Law and first used at the instigation of ecclesiastics for the evasion of the Mortmain Law, whereby a double property in land was created and a distinction set up between the legal and the beneficial owner. By the practice of Uses an estate was left to a man and his heirs for the use of some one else and his heirs. Such a disposition could of course be made to take effect either in a man's lifetime or after his death; and by this means the power of regulating an interest in land by will, which had died out with the introduction of feudal laws at the Conquest, was practically recovered.

✓ The legal owner, who alone was recognized by the Common Law, was technically called the *feoffee to uses*; and the beneficial owner, who had no legal standing, was distinguished as *cestui que use*. Thus the right of the beneficial owner rested at first merely on moral or religious obligation, so that it was often possible for the feoffee to uses to suffer forfeiture, to alienate, or to create charges upon the lands, and thus to defeat the intention of the original donor, without any remedy on the part of the unfortunate *cestui que use*. But with the growth of the equitable jurisdiction of the Chancellor came the enforcement by legal means of the right of *cestui que use*; for, as an ecclesiastic, the Chancellor would be especially interested in anything which bound the conscience, and which, until restrained by Statute, evaded the Statute of Mortmain; while as 'depository of the undefined prerogative of the Crown' he would be petitioned to intervene against any individual too powerful to be touched by the Common Law, or in cases for which the Common Law provided no remedy. Moreover, the Chancellor acted by Writ of *Subpœna*, commanding the person complained of to appear before him 'under penalty'; and his decrees were from the first enforced by 'attachment,' i. e. arrest and imprisonment for contempt of court. This gave the Chancellor a power, not possessed by the Common Law Courts, of enforcing contracts; and he would,

in the exercise of that power, not only restrain the feoffee to uses from dealing with the land as he liked to the detriment of cestui que use, but even bind him over to carry out the lawful wishes of cestui que use with regard to the disposition, by sale or otherwise, of that beneficial interest, whether during lifetime or in accordance with the will of cestui que use.

But this legal enforcement of Uses only served to legalize many unfortunate evils; and legislation was necessary to check the application of the system in many possible directions. For, until the restraint imposed by Statute 15 Richard II, c. 5, lands could be held by an individual to the use of a religious corporation, and the Statute of Mortmain could be thus evaded. Again, a debtor, by making over the legal ownership of his land to another who should hold it to the debtor's use, very effectually contrived to evade his creditors, until the Statute 50 Edward III, c. 6, restrained such collusive conveyance with intent to defraud. The practice was equally convenient for the protection of a disseisor, i. e. a wrongful possessor of land, who would secure his tenure by making over the land to some great lord, whom it would be difficult to oust and who would consent to hold it to the use of the disseisor. This too was met by the Statute 1 Richard II, c. 9. Finally, it was an indispensable weapon whether against the king to avoid forfeiture for treason, or against the over-lord who would claim escheat on the failure of heirs, so long as the legal ownership remained in the ~~treasonous~~ or the heirless person. Results of their enforcement.

The only remedy was to *assimilate the position of the beneficial to that of the legal owner*. This was partly obtained by the two Statutes, Richard III, c. 1, which made valid the dispositions of cestui que use without the consent of the feoffee to uses, and 4 Henry VII, c. 17, which gave to the lord the wardship of the heir of cestui que use: but it was the great *Statute of Uses* (27 Hen. VIII, c. 10) of 1535 which definitely converted the beneficial into the legal owner, and made the former accountable to his lord for all feudal services and dues. This had the further effect of destroying the power—which had become both possible and common with the growth of Uses—of disposing of interests in land by will. But the result of the Statute was directly the reverse of its purpose. The interpreters of the Common Law held that the Statute had provided for only one Remedies.

transfer from the legal to the beneficial owner, so that no account could be taken of any further interest. 'An use,' said the judges, without any apparent reason, 'cannot be engendered of an use.' Thus, if land was left to *A* to the use of *B* to the use of *C*, the Statute was held to be satisfied in the securing of *B*'s interest, and *C*'s claims were left as before to the jurisdiction of the Chancellor, who in this restored the distinction between the equitable and legal estate which it had been a main object of the Statute to extinguish. These second Uses were what are known to modern law as *Trusts*. Again, the restriction placed by the practical extinction of Uses on the power of Wills, was so unpopular among the land-owners that as early as 1540 its restoration within limits was found necessary. The Statute of Wills (32 Hen. VIII, c. 1) allowed a tenant in fee simple to dispose by will of all lands held in socage, and of two-thirds of any lands held by military tenure.

Abolition of
feudal
tenure.

But the military tenure was doomed. The services due from it, long obsolete, were regarded as an unnecessary burden, though the system of uses for some time alleviated their pressure. But under Henry VIII not only were Uses abolished, but a special Court of Wards and Liveries was created for the express purpose of asserting more effectually the feudal rights of the Crown. The result was a strenuous endeavour to get rid of the feudal tenures. The first attempt under James I, known as the Great Contract, failed because the king refused to surrender *all* his rights. But the Long Parliament abolished Distrain of Knighthood¹; and in 1645 the Commons and Lords at Westminster voted the abolition of the Court of Wards and Liveries, and of military tenures by the substitution of tenure in socage². This was confirmed by the Parliament of 1656, and finally by the Long Parliament of the Restoration in 1661 (12 Car. II, c. 24). Henceforth it became possible under the Statute of Wills to dispose by will of the whole of lands held in fee simple, which could now be held only on the one tenure of socage.

¹ Gardiner,
Const.
Docts. of
Puritan
Rev. p. 121.
² *Ibid.* p.
207.

Mortmain
Laws.

Two subjects remain for consideration—the Mortmain Laws and the Modern Strict Settlement.

Land granted to a religious house, the number of which in mediæval England was very great and the possessions most

extensive, was held either in frankalmoigne¹, which involved no¹ p. 20. service beyond prayer for the soul of the benefactor and his kin, or more commonly in fee simple by military tenure. But in this case the fact that the holder was a corporation and therefore never died, caused loss to the lords of all those dues which came from the lucrative items of Relief, Wardship, Marriage, Forfeiture or Escheat. Such land was said to have fallen in mortuâ manu, 'since from the majority of legal claims, it was practically void or dead.' Thus it was to the interest of the superior lords to restrain such grants on the part of their pious or dying tenants. The vague forty-third Article of the Second Reissue of the Charter (1217²), which³ Sel. Chart. p. 347. had been construed as prohibiting all grants of land to religious houses, was defined and extended by the third great Statute in Edward I's land legislation (7 Edw. I, 1279) known as *De Viris Religiosis*, which forbade such grants to all corporations, lay as well as ecclesiastical. But the class which was interested in the evasion of the Statute was too large and powerful to let it go by unhindered. The terms of the Statute were held to apply only to acquisition of land by gift or sale, and not to land gained by process of law. Thus recourse was had to the medium of a Recovery by which the ecclesiastics collusively sued the occupying tenant, who thereupon made default, and the land was adjudged in fee simple to the designing monks. But the Crown and the overlords would not tamely submit to so large a loss of their rights. The Statute of Westminster II (13 Edw. I, c. 32) placed in the hands of a jury the determination of the right of the claimants to the land, and, in case of the disallowance of the claim, gave the land in forfeit to the overlord. The ecclesiastics returned to the charge armed with the method of Uses, until they were effectually and finally restrained by the Statute 15 Richard II, c. 5. Henceforth there were only two methods of getting over the restriction, by licence from the Crown or the mesne lords, if any, until the Statute 7 & 8 William III, c. 37 removed the necessity for the consent of the latter; or through exemptions made by Statute in favour of particular corporations or classes of corporations, such as the Universities and Colleges of Oxford and Cambridge or limited Companies³.

It is impossible to do more than merely indicate the chief²¹⁷.³ Digby, p.

Strict Settlements.

points connected with the growth of the complicated and technical process known as a *Strict or Family Settlement*. We have noticed the desperate effort made by the smaller landowners after the passing of De Donis to break through the entail which was then engrafted on the law, and how from the fifteenth century they were able to do so by the use of a Recovery, and from the sixteenth century by a Fine, until both methods were extinguished in 1833. But although it was quite impossible to prevent a tenant in tail from exchanging his holding for an estate in fee simple, something could be done on the part of the great landowners to keep their estates from alienation; and here they found the lawyers able and willing to help them. The perfection of the form of Strict Settlement is generally attributed to the legal ingenuity of Sir Orlando Bridgman, Lord Keeper in succession to Clarendon, but it had been preparing for some time previously.

After the Statute De Donis the grant of an estate for life to *A* might be followed by the grant to *B* of an estate tail in remainder, that is, on the death of *A*; so that the estate was inalienable for the life of *A*, except with the consent of the life-possessor, and until *B* became of full age. When this event occurred, *B* had it in his power to 'suffer a recovery' and so to break the entail and obtain a fee simple, of which he could dispose as he pleased. But in process of time there arose a gradually recognized distinction between a *vested* and a *contingent* remainder. By the former, 'an estate of future enjoyment' was conferred on a person or persons in order, already existing at the death of the present holder; whereas the latter was given to a person not as yet in existence and on the occurrence of a wholly hypothetical event, namely his birth. In accordance with this distinction it was settled that the final tenancy in tail could be conferred on the unborn child of an as yet unmarried though living tenant for life, and in order to prevent the indefinite inalienability of the estate, it came to be ultimately recognized about the middle of the eighteenth century, by the application of the 'rule against perpetuities,' that the furthest limit of time for which an estate can at any one moment be tied up and rendered inalienable, is the attainment of the legal majority by the first tenant in tail mentioned in the settlement,

at which period the tenant in tail can exercise his discretion of keeping or breaking the entail. But in order that the estate may be handed down through generations, as far as possible inviolate, it became customary for the son (the unborn tenant in tail) on his coming of age, in consideration perhaps of a substantial allowance from his father, to break the entail and, in conjunction with the father, who after 1833 was known as the Protector of the settlement, to make a resettlement of the estate upon his as yet unborn son or sons in succession. Thus the son in his turn becomes a mere tenant for life of his estate, and no alienation of the property can be made until his own as yet unborn son comes of age.

CHAPTER II.

THE ADMINISTRATIVE.

The Crown and the Council.

Divisions
of govern-
ment.

§ 8. PROGRESS in the science of government, as in any other practical work, may be traced in the increasing subdivision of functions to which the attempts to satisfy new wants necessarily leads. Indeed, it is as a provision for better administration, and not as a security to civil liberty, that the work of government has in the process of time become more specialized. These functions fall roughly but naturally into three. (1) The duty of making the law belongs in a highly advanced state to the whole body politic, and in any case the law-maker, the holder of the *legislative* power, is the real sovereign of the country. (2) All modern constitutions recognize that the interpreters of the law, the *judicial* bench, should be separate from those who make it; otherwise there is no security against arbitrary stretches of authority under a legal guise. (3) Even more necessary is the division between the *administrative*, or promulgating body, and the judges; otherwise the doers of possibly illegal acts would be their own judges in the matter. The student of constitutional history has to learn the late recognition of even these broad and obvious distinctions. For convenience sake, however, the question will be treated from the modern standpoint, and the three-fold division just noticed will be taken for granted. But inasmuch as the most prominent power in an early state of organization is the administrative, which both issues isolated ordinances and then applies them, historical accuracy demands that it should be first noticed. The formation of a definite

Chap. ii.

legislature which draws up scientific and permanent laws, is a much later process, but follows in course of time. With its growth the administrative loses much of its early initiation, and tends more and more to become a mere executive carrying out the commands of the sovereign power. Laws cannot be interpreted until they have been made; so that logical necessity, as well as historical accuracy, dictates the treatment of the judiciary last in order of the three. But the administrative does not surrender its exclusive power of initiation without a severe struggle; and the longest and most interesting chapter in the history of the English Constitution is formed by the rivalry between a small and highly centralized administrative on the one side, and on the other a large but representative legislature.

The administrative in England is formed of an hereditary monarch, holding the crown under certain religious restrictions, and a council, which though always nominally composed of ministers of the Crown, has actually undergone considerable alteration. Each of these members of the administrative body must be dealt with separately.

§ 9. The historical position of the CROWN in the English Constitution will best be realized from a description, firstly, of the *title* on which it has at various periods been held, and next, of that theoretical basis of the kingly power known as the *royal prerogative*.

Before the migration of the English folk to Britain, the general system of government as described by Tacitus, was that of a national assembly of all fully qualified freemen, for whose final decision the items of business had been prepared by a small committee composed of the elected magistrates¹. A few of the tribes had, however, adopted royalty; but in such cases the kings were elected from among the nobles and occupied an honorary position as impersonating the unity of the tribe; though even at this early stage a strong ruler could make his position much more real, especially by the advancement to high office of his favourites². The particular circumstances of the conquest of Britain, especially the continuous warfare, caused the adoption of kingly rule by all the tribes. 'War begat the King'; the successful chief assured for himself a permanent position. But this position was not as yet

Title to the Crown.

¹ *Germania*, c. 11.
(1) Election.

² *Ibid.* c. 25.

¹ Stubbs,
Const.
Hist.
§§ 59-62.

fortified by theories of sovereignty. The English king was a representative chief, and as the embodiment of the dignity and history of the community he was endowed with special sources of revenue from the land of the community, and was adorned with the insignia of royalty, the throne, the crown, the sceptre, standard and lance¹. But both in theory and in practice was the monarchy *elective*, and although for convenience sake the choice of the Witan was restricted to the members of one family, the most competent individual of that family would be the favourite irrespective of strict hereditary claims; while the elective theory was further kept alive by the occasional use of the power of deposition. Nor, despite the very changed position of the Norman conquerors, did the elective theory at once disappear. William, claiming to succeed Edward the Confessor as his lawful heir, submitted himself to the election of the Witan, and the continued existence of the theory was ensured alike by the personal character of kingship which made all the rulers until John kings of the English people and not of the land, by the ceremony of coronation, involving as it did a recommendation to and election by the people, and by the circumstances under which each of the three later Norman kings succeeded to the throne: for both William II and Henry I had to make good their title against their elder brother Robert, and Stephen by such means cut out the dynastically better claim of Matilda. In proof of the elective title, each of the Norman kings on his accession issued a charter of promised reforms in return for his election².

²*Sel. Chart.*
pp. 100,
120.

(2) Here-
ditary
right.

But this theory of election, modified as it was by the hereditary claims of one family, was gradually superseded by the idea of *pure hereditary right*. So long as it lay with the Witan or Great Council to make the actual choice, the ceremony of election and the resulting coronation were essential to the exercise of royal authority, and between the death of the previous monarch and the election of his successor there was an actual interregnum during which it was no one's business to maintain peace and order in the country. But the feudal theories which established themselves at the coming of the Normans, did much to mitigate the evils of this elective system. For the election by the Witan as forming the basis of the

royal title, was substituted the homage of the vassals; while 'the feudal land law assimilated the descent of the Crown to the descent of an estate in fee simple' (Sir W. Anson¹). Thus a territorial was substituted for a personal basis, and the king and representative of the people became the king and owner of the land. Another influence was at work in the same direction. Hereditary right soon tended to include an *inde-feasible claim*. The lawful successor could in no case be deprived of his right, for such right was of divine origin. The old divinity of descent claimed by the heathen Saxons for their kings, had now given way to divinity of office. This was due to the action of two great bodies—the Church, in its desire to enforce on the holder of the Crown the sense of responsibility; the lawyers, who, urged on in the twelfth century by the increased influence of the Roman law, sought to strengthen the authority of the law by exalting that of the theoretical lawgiver.

It was in accordance with the growing influence of this hereditary view of kingship, that Richard I and John omitted to follow the custom of their predecessors in the issue of charters of liberties at their accession. John, moreover, was the first Rex Angliae. Henry III, though a mere child and at a time of national crisis, was accepted without demur; while Edward I was proclaimed in his absence and reigned for nearly two years before his coronation. This was the first constitutional recognition of the altered character of kingship. After his reign the proofs are abundant. Thus, Edward II dated his reign from the day after his father's death, and a new coronation oath was framed to express the changed position of the Crown; Edward III proclaimed the peace before his coronation. Richard II's reign supplies two most remarkable proofs. He was accepted, although a minor and despite the existence of several uncles who had taken a prominent part in public affairs. This circumstance seems to have duly impressed itself upon him, for on his deposition he refused to renounce the spiritual honour of the royal character imposed on him by his coronation and his unction:

'Not all the water in the rough rude sea
Can wash the balm off from an anointed King.'—
Shakespeare, *Rich. II*, Act iii. Sc. 2.

¹ *Law and Custom of the Constitution*, ii. 56.

Its establishment.

From the succeeding century come two striking cases of the influence of arguments based on hereditary claims. Henry IV, beyond and above his election and the homage of the royal vassals, went out of his way to revive an old tradition in favour of the superior claim of Edmund Crouchback, the brother of Edward I and the ancestor of the Lancastrian line. But, although this claim deceived no one, the tendency to which it bore witness was more completely exemplified when Richard, Duke of York, and his son Edward IV triumphed over the Lancastrians with a title based merely on hereditary right. Such a claim was held to be superior to election, to oaths of fealty, to the ceremony of coronation.

(3) Act of
Parliament.

¹ *Lects.
Mod. and
Med. Hist.*
p. 345.

² *Law and
Custom of
Const.* ii.
58-9.

But this apparently complete triumph of the hereditary principle was almost immediately followed by the *revival in a slightly changed form of the old principle of election*. Henry VII claimed the crown by hereditary right, and, although his claim is asserted to be arguable (Dr. Stubbs¹), his legal title was derived from an Act of Parliament which settled the Crown on himself and the heirs of his body. Indeed, it has been justly said that, 'from this time forth our history illustrates the conflict between two views of kingship . . . title by descent and title by choice of Parliament,' which 'came to express two different views of kingship' (Sir W. Anson²). Under the Tudors the latter title was frequently asserted. Thus, the Act of Royal Succession (25 Henry VIII, c. 22) settled the Crown on the issue of Anne Boleyn; a later Act (28 Henry VIII, c. 7) not only settled the succession on the children of Jane Seymour, to the exclusion of those of Katherine of Aragon or of Anne Boleyn, but even, in the event of the king surviving his own issue, conferred on him the power of naming, either by letters patent or by will, whomsoever he wished as his successor; and another Act (35 Henry VIII, c. 1) reinstated the children of Katherine and Anne, while still leaving to the king the power in the last resort of nominating his successor. Under Elizabeth, again, the power of Parliament as against the claims of Mary Queen of Scots was most strenuously affirmed. An Act of 1571 (13 Eliz. c. 1) declared it treasonable to maintain that the law and statutes did not limit the succession to the throne, or that any particular person except the issue of the Queen was lawful heir, before the same should be so

established and affirmed by Act of Parliament. Thus Parliament did not now claim to assert its elective power on the death of each sovereign, but only in the event of a break in the royal line. But under the Stuarts circumstances forced forward the alternative view of hereditary right. The complete severance of the feudal bond required something which should fill its place. The studies of the Renaissance caused a revival of the patriarchal theories of monarchy; while, in the decadence of the Empire, the powers once attributed to the temporal head of Christendom were now claimed for the heads of the growing nations. Thus the mediaeval theory of divine right, with its twofold assertion that kings derived their authority from God and that such authority was absolute, once more came to the front; and the special circumstances under which the Stuarts obtained the throne added a new and more dangerous tenet in the insistence on the hereditary character of such monarchy. For, despite Henry VIII's use of the power conferred on him by Parliament to exclude the Scotch line from the throne, its representative had quietly obtained possession. The Church was willing to go even further, and to maintain, in opposition to the Jesuit doctrine of the papal right to depose kings, the absolute sinfulness of resistance to the monarchy. But James condemned the canons of 1606 in which this was asserted, pointing out that if a foreign ruler seized the throne, the people would have no right to overthrow him.

The two rival theories finally joined issue in the case of James II; and on his flight from the kingdom it was asserted, in the Declaration of Rights, that he had abdicated, and that thereby the throne became vacant. The Convention then proceeded to offer the throne jointly to William and Mary. By the Bill of Rights (Oct. 1689) the succession was limited to the heirs of Mary, then those of Anne her sister, and then those of William by another wife. In 1700 the Act of Settlement added, after the lines enumerated in 1689, the person and descendants of Sophia, Electress of Hanover; and it is under this final settlement that the Crown is at present held. But it is important to notice with Mr. Hallam¹ that the great work of the Revolution of 1688 was that it broke the line of succession. 'The changes which then took place were either

modern
title to the
Crown.

¹ *Const.
Hist. of
Eng.* iii,
92.

declarations of principle or changes of practice, and of actual legal limitation there was but little. Parliament had settled the succession to the Crown before, and it settled the succession again,¹ and yet it will be found that 'the conception of a royal prerogative superior to all the rules of law had survived the catastrophe of the Rebellion'. We are thus led naturally to our second illustration of the historical position of the Crown—the history of the development of the royal prerogative.

¹ Anson, *Law and Custom of Const.* ii. 61.

The Royal Prerogative.

§ 10. It has been shown that the monarchy was in its origin the representative of the people. So long as this aspect was predominant, there could be no question of special rights or powers on the part of the monarch. As the head of a feudal society his position was limited and defined by the theoretical action of a feudal council of tenants-in-chief. Thus it was not until all trace of the old representative character of the Crown had been wiped out by the feudal theory of the king's proprietary right, that any definition of the royal prerogative became possible. The royal power now came to be regarded as inherent, and this view grew side by side with the hereditary, as opposed to the elective, right to the title. Already, since the days of Henry II, the clergy and lawyers had been at work. The former made use of the Scriptures to enforce on the king the sense of responsibility; and on the people the religious duty of obedience, of which they were the first to feel the embarrassing effects. Meanwhile the lawyers, with the aid of the revived Civil Law of Rome, built up the systems of allegiance, fealty and homage. Thus Glanvill applied to Henry II the maxim of Justinian that the pleasure of the king has the force of law; while the author of the *Dialogus de Scaccario*² asserts that king's deeds are not to be judged by men. This was nothing else than the assertion of absolute power. No wonder, then, that when, with the growth of Parliament, national demands are formulated and rights made good, it seems as if royalty becomes in theory more absolute as in practice it is increasingly limited by the national will. The result was that the theory of the prerogative, as it emerged, expressed not only that the king might do everything except that which he had especially promised not to do, but that he might even repudiate any obligation which he thought to stand in the way of or to tell

² *Sel. Chart.* p. 169.

against his sovereign right. Thus the prerogative was a kind of inexhaustible reservoir on which the king could draw at need, and of which, at the best, portions alone could be cut off by separate and oft-repeated acts of the people. All power was inherent in the king; everything emanated from him; he was the supreme landowner, the source of justice; in himself individually was summed up the State. The painfully-won rights of the people seemed scarcely to touch the exercise of the royal power; for, beyond these definite claims made from time to time by Parliament, there extended the region of undefined prerogative

It was in accordance with this theory that the judges of the Stuart kings defined the prerogative as twofold. It contained the king's ordinary power, which he exercised in accordance with the will of Parliament; and his extraordinary power, which was for the good of the State and could not be diminished. In this view the ordinary power was that which the king had practically surrendered, and the exercise of which, so far as the king was concerned, was subject to custom and to statute. As far as it was regulated by statute, the king could not lawfully act without the concurrence of Parliament, and such powers really ceased to form part of the royal prerogative. Moreover, custom had rendered the consent of his Council necessary to the king's action in certain cases. This might or might not be a real limiting power: it was so under the early Lancastrians, while the Tudors and Stuarts exercised their prerogative through the Council. Again, the Law Courts might have formed a limit to the royal authority; but the use of royal writs, the royal power of pardon and the entire dependence of the judges on the crown minimized the force of such a check. There were, besides, other attributes and rights of the crown which it shared with no body in the kingdom. Such were those rights drawn from the position of the king as feudal lord, and carrying with them not only powers incidental to the ownership of an estate, but also the conception of treason and allegiance as matters personal to the sovereign. Such also were certain attributes, the result of legal theory, which for convenience sake established the important maxims that the king never dies, and that the king can do no wrong.

Its definition under the Stuarts.

With certain additions, then, the royal prerogative may be

Effect of
the Revolution upon
it.

¹ p. 63.

defined as the *discretionary power of the Crown*. So long as this was exercised on the whole in the interests of the people, even when as against individuals it was subject to no legal check, there was little complaint. But in the hands of the Stuarts the definition of the prerogative went alongside of the claim of hereditary and indefeasible right. Thus the Revolution of 1688 materially affected the position of the Crown in both these points. The struggle between Crown and Parliament for the right to say the final word, ended in the complete victory of the latter. But, as already pointed out ¹, the legal changes which resulted were very slight. In theory, the Crown kept all the prerogatives which had descended to it from times past. It was still the fountain of justice and of honour: the ministers were still its servants: it still called and dissolved Parliament. But none of these powers could now be used except with the popular approval, and indeed it was only too likely that many of them would have to be employed in direct opposition to the personal wishes of the Crown. The Bill of Rights had, among other things, prohibited the maintenance of that standing army which the later Stuarts, in imitation of the Commonwealth, were rearing for their purposes; and the custom of an annual Mutiny Bill, or vote for the maintenance of troops, ensured both the observance of this and the regular annual session of Parliament. The last of the king's dangerous prerogatives went when the Act of Settlement took from the Crown the power of dismissing the judges at pleasure, and when the gradual growth of party government had identified the servants of the Crown with the nominees of the people.

Its present
position.

While, then, the prerogatives of the Crown in theory remain almost intact, the checks upon them have become real. The Council is now the Cabinet or representative of the majority in Parliament: the Law Courts are not amenable to arbitrary interference; the Judges need no longer fear dismissal for decisions adverse to the personal wishes of the Crown. And yet the personal influence of the Crown need not be underrated. The monarch is permanent while the ministers change. He is consulted and supplied with full information on every topic. His experience in the course of a lengthy reign is bound to be of considerable value and weight. Thus, although the royal prerogatives have to be exercised in accordance with

law or an equally binding custom, a clever sovereign must, and an evil-disposed sovereign might, wield an influence which cannot be calculated only because there has been as yet no opportunity of asserting it.

§ 11. Ever since the firm establishment of the principle of hereditary monarchy it has been the accepted legal maxim that 'the king never dies'; in other words, that there can be no abeyance of the royal functions. But, if the heir succeeds to the throne at the moment of his predecessor's death, there are occasions during the life-time of a reigning monarch when, from one cause or another, he is incapable of discharging the duties of his office. Such incapacity is of two kinds. It may be *temporary*, caused either by absence from the kingdom, by a vacancy created by deposition, or by that infancy of the wearer of the crown which is inseparable from hereditary monarchy. The incapacity may also be *permanent*, such as would be caused by severe illness or insanity on the part of the monarch. Of all these our history affords numerous instances; but the point of constitutional importance in each case is the particular provision which was made for the discharge of the royal functions.

Absence from the kingdom was fairly frequent when, as under the Norman and early Angevin sovereigns, the English king was also the ruler of a great continental empire. Accordingly, the Norman kings created an official, analogous to the Norman seneschal or steward, to whom after a time was pre-eminently applied the common judicial title of *justiciar*. Under William I merely temporary, in the organizing hands of Ranulf Flambard under William II the justiciar became the permanent lieutenant of the kingdom and the head of the whole judicial and financial machinery of government. So great an office was at first given to ecclesiastics, who could not make it hereditary; but Henry II felt himself sufficiently free from any chance of dictation by a baronial holder of the office, and accordingly appointed laymen. His sons, however, returned to the previous practice. With the fall of Hubert de Burgh (1232) the office lost its unique position. The justiciar sank into the Chief Justice of the Court of King's Bench, and his great political position was ultimately taken by the Chancellor. Consequently, on the king's

For temporary absence.

- absence other provision had to be made, and in 1254, during Henry III's expedition into Gascony, the queen and the Earl of Cornwall were made *Custodes regni*. This practice was followed on subsequent occasions, the last instance being the appointment of Queen Caroline, wife of George II, in 1732. Meanwhile, resort was occasionally had to a third method. The exceptional absence of Edward I at the beginning of his reign had been met by the appointment of a committee of the Concilium Ordinarium, nominated beforehand and confirmed by the magnates. It was in the reign of William III (1695), after the death of Queen Mary, who had been empowered by statute to exercise the royal prerogative in her husband's
- (3) absence, that the custom began of the appointment of *Lords Justices under the Great Seal*, whose powers were specified in the letters patent which gave them their commission. Henceforth this became the usual method of providing for the absence of the monarch, the last instance being in 1837, when a provisional appointment was made, to take effect in the event of the queen's death while the heir (the King of Hanover) was abroad. The improved methods of communication have practically rendered it unnecessary to make any provision in recent years for the occasional absence of the sovereign.

In vacancy
of the
throne.

A temporary vacancy of the royal office has more than once been created by the *deposition of the reigning monarch*. In all three cases which call for notice, much attention has been paid to forms. Both Edward II and Richard II were themselves practically forced to be consenting parties to their own dethronement. For Edward II alone was there an heir ready, in whose name was summoned the Parliament which pronounced the deposition. It was only after the throne had actually been declared vacant that Henry IV, on the one occasion, and William III and Mary on the other, were accepted by the assemblies which they had themselves been instrumental in calling together. Finally, James II did not wait for a formal deposition, but left the throne vacant by a timely flight which, to salve over the consciences of the believers in divine and indefeasible right, was construed into a voluntary abdication.

During a
minority.

The *minority* of a newly ascending monarch has given frequent occasion for the appointment of guardians and Councils of Regency. The methods of appointment have been almost

as numerous as the cases. Thus, for Henry III the *Barons* ⁽¹⁾ appointed William Marshall, Earl of Pembroke, as *Rector Regis et Regni*, together with a small assistant council. For Richard II a Council of Regency was provided by the joint action of the young king himself and the magnates. On the accession of Edward V, his father's Privy Council assumed the power and appointed Richard, Duke of Gloucester, as Protector. On two occasions the *reigning king* has made provision for his successor, ⁽²⁾ and in each case have his arrangements been modified. Thus, Henry V appointed the Duke of Bedford Regent in France and the Duke of Gloucester to the parallel office in England. But immediately on his death the lords made Bedford Regent in England also, only giving the power to Gloucester in his absence. Parliament subsequently added sixteen counsellors. In accordance with an Act of Parliament, 'the first Regency Act and the only one of the kind that ever took effect' (Sir W. Anson), Henry VIII nominated a Council of Regency, which on his death promptly altered the intention of the late king by making Somerset Protector, in which it was upheld by the lords and the young king himself. All modern provisions for a regency are of course made by *Act of Parlia-* ⁽³⁾ *ment*. Already in the case of Edward III Parliament had appointed a Council of Regency; while for Henry VI they had considerably modified the dispositions of his father. In 1751, on the death of Frederick Prince of Wales, an Act of Parliament provided a Regent if necessary in the person of the Princess Dowager of Wales, and nominated a Council to whom the present king could make four additions. In 1765 a severe illness from which George III had just recovered, seemed to make it prudent to provide for the event of his death. The king, with his high notions of the royal prerogative, claimed the right of nominating as Regent any person whom he chose. He was, however, obliged to give way, and a Regency Act empowered him to nominate either the Queen, the Princess Dowager of Wales or any descendant of George II. Subsequent Regency Acts were those of 1830 appointing the Duchess of Kent, and of 1840 appointing the Prince Consort to a like office in the event of the then heir succeeding as a minor to the throne.

A more permanent kind of incapacity which has beset the

In mental
incapacity
of the
monarch.

occupants of the throne, has come from *severe illness ending in actual insanity*. Of this our history affords two important instances. In the case of Henry VI, on the occasion of his first illness in 1454, the Lords chose the Duke of York as Protector, and their choice was embodied in an Act of Parliament. On the second occasion, in 1455, the Lords at the request of the Commons again nominated the Duke of York, whose appointment was ratified in letters patent by the king himself. The proceedings in the case of George III were complicated by political considerations. The simplest method would have been to imitate the Convention Parliament of 1688 and, by an Address, to request the obvious person to assume the functions of royalty. But this 'obvious person,' the Prince of Wales, was deeply committed to the cause of the Parliamentary Opposition, and Pitt, the Prime Minister, knew that his appointment would be followed by the instalment of the Opposition in office, with a majority purchased by all the means of influence at the disposal of the Crown. Pitt, therefore, determined to impose restrictions on the exercise of the prerogative in the hands of the Prince, and an Act of Parliament rather than an Address became the necessary procedure. Political animosity caused the two Parliamentary parties to reverse the principles which for a century they had respectively upheld. Fox, the leader of the Opposition, although acknowledging that it was the duty of Parliament to declare at what period the Regent should assume power, yet maintained that when Parliament had so decided, the Prince of Wales had as clear a right to the attributes of sovereignty as if the King were already dead. Pitt, on the other hand, was driven to declare that, except by decision of Parliament, the Prince had no more right to the regency than any other subject of the Crown. But if, as Fox asserted, this argument introduced the principle of election into the first branch of the legislature, which was as unconstitutional as the introduction of heredity into the House of Commons, a more practical difficulty still remained. Procedure by statute necessitated the royal assent which, under the circumstances, was impossible. The solution of this difficulty to which Pitt resorted, has incurred the condemnation of constitutional lawyers. The two Houses were to authorize the Chancellor to put the Great Seal to letters patent appointing one

commission for opening Parliament, and another commission which should give its assent to the Regency Bill. Before the bill passed, the king recovered ; but on his relapse in 1810 the same method was employed, and a bill containing restrictions on the Regent's power in the matter of the creation of peers and the grant of offices and pensions, received the royal assent by a commission appointed by Parliament. Many eminent lawyers united in condemnation of this 'phantom King,' whose will was a mere echo of that of 'the other two estates,' and thereby robbed of all meaning the exercise of the power which still lay in the royal prerogative. 'The precedent established,' says an historian (Mr. Lecky¹), 'was a revolutionary one,' and he adds his belief that 'if England should ever again pass through a period of revolution, and if it should be thought desirable to throw over that revolution a colour of precedent and legality, this page of history will not be forgotten.'

¹ *Hist. of Eng.* v. 124.

§ 12. The bond between sovereign and subject is to be found in the Oath of Allegiance. It dates, together with Fealty and Homage, from the time of a fully developed feudal sovereignty. All three words express various sides of the relations between a feudal monarch and his people. Thus *Fealty* (foi) was the promise of the military follower to be personally faithful : *Homage* was definitely connected with the bestowal of land ; while *Allegiance* was due from every member of the community, whether he were a landholder or not. But with the decay of the feudal status the two former sank into mere ceremonies ; and although the establishment of an efficient system of police has rendered superfluous the necessary exaction of an oath, allegiance is still due not only from citizens, in which case it is called *natural*, but also from resident aliens under the name of *local* allegiance. Originally the territorial nature of feudal sovereignty not only extended the duty of allegiance over all who were born in the country irrespective of their parentage, but even made such allegiance perpetual. The Naturalization Act of 1870, however, enables a British born subject to become, by renunciation of allegiance, a naturalized subject of a foreign power. The methods by which, at the same time, aliens have been enabled to acquire citizenship, will be dealt with in a subsequent chapter in connexion with the Liberty of the Subject.

Relations between sovereign and subject.

Allegiance.

The Law of
Treason.

The betrayal of allegiance constituted *Treason*. The LAW OF TREASON formed perhaps the strongest bulwark of the royal power. It grew with the growth of kingship. Thus in the earlier Anglo-Saxon laws the difference between the life of the king and that of an ordinary freeman is one merely of degree: both were estimated in money, though of course at widely different sums. As the king's position increased, his life became of increasing value, until it reached a point at which harm done to his person could not be atoned for save with the life of the wrong-doer. It is this *difference in kind between injury to the king and injury to an individual*, which constitutes the law of treason. The first hint of the change is found in Alfred's law (c. 4) that any man plotting against the king's life

¹ *Sel. Chart.*

p. 62.

² *Ibid.*

p. 67.

Its early
history.

should be 'liable in his life and in all that he has'. But for the present the king shared this position, as he did Eadmund's oath of fealty², with other lords. William the Conqueror's Oath of Allegiance at Salisbury (1086), together with his whole policy and that of his successors, must have made it impossible for the lords to compete any longer in this respect with the Crown. The great legal writers of Angevin times have nothing to say in respect of the lord. They draw their definitions largely, though not exclusively, from the Roman law of 'Majestas.' But the application of the law by the judges was very vague and apparently arbitrary. The only discoverable principle seems to have been the desire to extend the interpretation of a breach of allegiance as far as possible, so that the condemned person should lose his 'benefit of clergy' or right of trial by an ecclesiastical court, and the king should obtain the forfeiture of the criminal's land and goods, which, in the case of a conviction for felony, would have escheated to the superior lord. The commonest form of accusation—laid against the Despensers in 1321 and again in 1326, and against Mortimer in 1331—was that of 'accroaching royal power.' At last, in 1348, on the adjudication as treason of a mere case of highway robbery, the Commons asked for a definition of this offence of accroachment. Although the king returned, as his immediate answer, that cases should be decided by the judges as they arose, four years later came the first attempt to embody the principle in statute law. In 1352 the *Statute of Treasons* (25 Edw. III, c. 5), following closely on the lines laid down by the great jurist

Bracton¹, defined and limited treason to seven heads. These were (a) compassing or imagining the death of the king, the queen or their eldest son and heir; (b) violating the king's companion, eldest unmarried daughter or eldest son's wife; (c) levying war against the king in his realm; (d) adhering to and aiding the king's enemies in his realm and elsewhere; (e) counterfeiting the king's Great or Privy Seal; (f) issuing false money; and (g) slaying the Chancellor, Treasurer or Justices whilst discharging their offices. To these was added a proviso to the effect that Parliament might adjudge as treason, although not specified in the Act, any political misdeed of which a future offender might be convicted. The terms of this Act are most general. 'It enumerates,' it has been said², 'the only crimes likely to be committed against a popular king who has an undisputed title, and as to the limits of whose legal power there is no serious dispute.' In short, 'it protects nothing but the personal security of the king.' It seems probable that the mild and incomplete wording of the Act was due to the power and popularity, at that particular period, of the reigning king. On some such supposition alone can we account for all *omission from the Act of political conspiracy for the king's deposition, as apart from plots for his assassination, and until such conspiracy has become open war.*

¹ Lib. iii. cap. 3, fol. 118 b.
Edward III's Statute of Treasons.

² Stephen, *Hist. Crim. Law*, ii. 250.

Its great defect.

This serious defect for practical purposes was remedied in three different ways. In the *first* place, the proviso at the end of the Statute practically allowed *Parliament to create an ex post facto treason*. Legal writers have disputed as to whether this proviso referred to parliamentary action in a judicial, in which case it concerned the House of Lords alone, or in a legislative capacity. It was in the former that Parliament, at the instigation of the Lords Appellant in 1387-8, proceeded against Richard II's favourites. But for some reason this method of operation seems to have ceased, and Parliament proceeded by a bill of attainder which involved no definition, rather than by impeachment on formulated charges. A *second* method of overcoming the defects of Edward III's Act was by *additional legislation*. This was, however, only intended to be temporary. The only permanent addition made for two centuries to the statute law on the subject of treason, was the Act of Henry VII

Remedies.

(1) Action of Parliament.

(2) Temporary Legislation.

(11 Hen. VII, c. 1) of obedience to the king *de facto* as opposed to any king *de jure*, which was intended to quiet tender consciences by justifying to future generations and possibly under altered circumstances, their present obedience. Of temporary Acts there were many from Richard II onwards. Thus an Act of 1397 was repealed in 1401, and another of 1414 in 1442. But it is to the Tudor times that we must look for the most numerous instances of this method of fortifying the Crown. During the seventy years (1533-1603) of struggle for sovereignty in England between the Crown and the Pope, this was one of the weapons to which the Crown most naturally resorted in order to ensure the obedience of its subjects to the position which, for the first time, it found necessary so carefully to define. Thus Henry VIII forced through Parliament no less than nine Acts creating new treasons. Of these, four upheld the king against the Papal power, the chief being the Act of Supremacy, which made it treason to deny the king's title as head of the Church. The severity of their provisions has been overrated, for many of them were already included in Edward III's law, while others can be paralleled from the legislation of William III and Anne, to which no such character has been applied. The remaining five Acts, which 'are beyond all question of terrible severity',¹ dealt with the question of the succession, and made it treason to alter the settlement or to cast any doubt on the validity or the nullity respectively of the various marriages. Under Edward VI, while all the specially created treasons of his father were abolished, three others were placed on the statute book, namely, a denial of the king's supremacy (1547); riots of a certain specified kind (1549); and the denunciation of the king as an heretic or usurper (1551). These were all in their turn repealed by Mary, but the Spanish marriage was defended by making it treason to deny his titles to the king consort. The same Act (1 & 2 Phil. and Mary, c. 10) made it treason to pray for the queen's death. One of the first acts of Elizabeth's reign was to re-enact this statute with an application to the new sovereign; but circumstances demanded further definitions. In 1571 the Pope's bull of deposition was met by an Act (13 Eliz. c. 1) making it treason to deny the power of the queen and Parliament to limit the succession, or to call the

²⁶ Hen.
VIII, c. 1.

¹ Stephen,
*Hist.
Crim. Law*,
ii. 258.

queen heretic, schismatic or usurper, or to bring papal bulls into England. A statute of 1581 (23 Eliz. c. 1) was aimed against the Pope's power of absolving subjects from their allegiance, and this was re-enacted by James I in 1606; while in 1585 another Act (27 Eliz. c. 2) was called forth by the machinations of the Jesuits. Similar circumstances in later reigns produced resort to similar expedients. In 1661 it was made treason to imagine any bodily injury to the king; in 1702, to hinder, or attempt to hinder, the next in succession to the throne according to the Act of Settlement; and in 1707, to assert by writing or printing the right to the crown of any other person than the next in succession according to the Act of Settlement, or to deny the power of the sovereign and Parliament to limit the succession.

Meanwhile, the *third*, and by far the most important, method of filling the gaps left by the Treason Statute, had become firmly established. The place which some legal writers think was meant to be filled by Parliament in its judicial capacity, was taken by the bench of judges. A consensus of *judicial decisions* established the principle that the words of Edward III's Act were intended to bear a much wider than their literal interpretation. In accordance with this principle, a *conspiracy to levy war* was construed as an overt act of imagining the king's death. This interpretation seems to have been finally established at the end of Elizabeth's reign when, in the case of the Earl of Essex (1600), the judges advised the Lords that 'in every rebellion the law intendeth as a consequent the compassing the death and deprivation of the king.' Possibly the late repeal of the severe treason laws of Henry VIII's reign exposed the defects of Edward III's law and so encouraged lawyers to make good the deficiencies 'by strained artificial constructions.' The same principle was applied to expressions of opinion. Thus *spoken words* could not be construed as an overt act, but they were held to expound an overt act. On the other hand, *words committed to writing* were held to be overt acts, while under the Stuarts, in the cases of *Peacham* (1615), and *Algernon Sidney* (1683), the judges actually interpreted *unpublished writings* in the same way. In short, the imagining of the king's death has been held to include an intention of 'anything whatever which

(3) Interpretation
of Judges.

under any circumstances may possibly have a tendency, however remote, to expose the king to personal danger or to the forcible deprivation of any part of the authority incidental to his office' (Sir J. F. Stephen¹). The *levying of war against the king in his realm* was construed in a similar fashion. According to the wording of the clause, the extent of the violence employed did not signify. Provided it was aimed against the king, it was treason. The original object was perhaps to distinguish between insurrections and private wars; but when, with the establishment of the royal power and the repressive measures of the Tudors, these latter ceased, all disturbances must of necessity be against the king's government. From this sweeping interpretation great lawyers, like Chief Justices Coke and Hale, tried to escape by making a distinction between mere riots and actual rebellion, founded on the object of the disturbance. Thus a special and local tumult, aiming, for example, at the throwing down of enclosures, would be included under the former head, while a general political movement to compel the action of the government in some particular direction would fall under the more serious charge of treason. But the judges as a body were not so lenient, and as late as 1668, in the case of *Messenger*, they pronounced a riot of apprentices for the purpose of pulling down houses of bad repute to be treason; and in 1710, in the case of *Dammaree*, they similarly treated a charge of destroying dissenting meeting houses in the riots connected with the trial of Dr. Sacheverell. In 1715, however, the Riot Act (1 Geo. I, c. 5) removed local riots from the action of the treason law, by making it a felony for rioters to refuse to disperse at the command of a magistrate.

(4) Statute Law. These far-fetched interpretations, which have been described 'by way of odium' as the Law of Constructive Treason, were brought to a test towards the end of the eighteenth century in the cases of *Lord George Gordon* (1780), of *Hardy* and of *Horne Tooke* (1794). In all these instances the reading of the law which was accepted by the counsel for the prisoners and was expounded by the judge to the jury, was this constructive law; but there seems little doubt that the acquittal of the prisoners in all these cases did 'in a popular sense' discredit this extreme latitude of interpretation. At any rate, in 1795

¹ *Hist. Crim. Law*, ii. 268.

came the first modern supplementary law of treason, and the Act 36 Geo. III, c. 7, which was made perpetual in 1817 (57 Geo. III, c. 6), both embodied the constructive interpretations put by lawyers on the 'compassing of the king's death,' and enumerated all the steps towards the death or deposition of the monarch or the coercion of him and of Parliament. This was followed by the Treason Felony Act of 1848 (11 & 12 Vict. c. 12) which converted into felonies all those acts which had now been brought under the head of 'compassing the king's death,' except such as were aimed at the person of the sovereign. Thus the terrible charge of treason, with all its attendant severities, has been defined and narrowed. Statute law has supplanted both Common Law and the interpretation of the judges. As in so many other ways, instead of the State being identified with the king, the king is now merged in the State.

The change in the *procedure* in trials for treason had been more rapid than the change in the law. Originally the trials were grossly unfair. The greatest latitude of procedure was allowed; the prisoner himself was cross-examined, and all kinds of evidence, written as well as oral, was accepted against him. A law of Edward VI (1552) attempted some remedy by making two witnesses necessary to prove an act of treason. But this was of slight effect. Under the Tudors the two witnesses bore testimony to different facts, and even, as in the trial of Babington (1586) on the plea that he was indicted under the Statute of Edward III, the necessity of two witnesses was waived. But in 1696 (7 & 8 Will. III, c. 3) an Act required that both witnesses should testify to the same overt act or to two overt acts under the same head of treason. It moreover provided for the delivery to the prisoner of a copy of the indictment and of a panel of the jury some days before the trial, and gave him the assistance of counsel and the power to compel the attendance of witnesses, all of which had hitherto been denied. Finally, while with the definition of treason the death penalty had been correspondingly reduced, the terrible surroundings of the penalty itself were removed. Originally the condemned man was liable to be hanged, drawn and quartered, and his lands and goods were forfeit. But the bodily liabilities were mitigated by two Acts of George III, which

Procedure
in trials of
treason.

permitted of beheadal, and in 1870 forfeitures for treason were abolished and the punishment itself was reduced to hanging.

The Curia
Regis.

§ 13. The Crown was assisted in the work of administration by a COUNCIL. In early English times no difference is to be found between the administrative and the legislative body in the kingdom. Both powers were centred in the Witan. But of central administration there was little. The Ealdormen ruled their provinces and the sheriffs their shires; but it was just in the absence of connexion between central and local governments that the fatal weakness of the English constitution lay. The Witan was primarily a legislative and consultative assembly, and will consequently find a more appropriate place in the next chapter.

¹ *Conquest
of Eng-
land*, pp.
542-8.

Early Nor-
man central
organiza-
tion.

An attempt has been made to discover the germs of an administrative body in England before the Conquest (Mr. J. R. Green¹); but, whatever its value, it is to the initiative of the Normans that we must attribute the first definite and successful discrimination between the different departments and functions of government. The great officers of the ducal household, imitated from the imperial court, furnished the Norman king with the first elements of a ministry. At first their duties as servants of the court and as administrators were difficult to separate; but with the reign of Henry I the organizing hand of Bishop Roger of Salisbury began the formation of a fairly permanent executive. To this he was helped by the tendency of the chief household offices to become hereditary in the families of the great nobles. They, consequently, sank in political significance; and their place was taken by a new set of officials, connected with the State rather than with the Court, whose good behaviour was ensured by the large sum of money exacted from them in return for the appointment. The organization of the administrative by Bishop Roger, chiefly for fiscal purposes, resulted in the formation of a *supreme court of justice and finance* presided over by the king in person, or by his lieutenant the Justiciar. The members of this court were of two kinds, (1) the great officers of the household, who sat here without any special qualification, though each of them had, besides, a staff of servants, and took cognizance of offences in the department over which he presided. Such courts, those of the High Steward,

Constable and Marshall, were outside the ordinary law of the land. The more important members of this court were (2) skilled officials, drawn from the new men whom Henry I was promoting to official posts as a counterpoise to the influence of the barons. They seem to have been called indiscriminately Justices (Justitiiarii) and Barons of the Exchequer (Barones Scaccarii), names which denoted the two aspects of this organized administrative body.

These two aspects or sides—the financial and the judicial—were kept quite distinct, and were, indeed, derived from different sources ; but they seem to have been worked by the same individuals. The *Exchequer*, or financial side of the court, seems at first to have been the more prominent of the two. There was undoubtedly a central department of finance in England before the Norman Conquest, and there is no reason to think that the Exchequer, as a system, was imported direct either from Normandy or from the Norman Court of Sicily, although when once they were started, all three courts may have borrowed organization, as they certainly borrowed officials, from each other. Bishop Roger's work here must have been simply the fuller organization of what had already existed in a rudimentary and inefficient form.

Organiza-
tion for
Finance.

In its judicial aspect, as the *Curia Regis*, the court probably represented an amalgamation of English and Norman institutions. Thus, while in England there are some shadowy traces of a court (Thening-manna gemot) for the trial of disputes between the royal thegns, which would correspond to the Norman feudal court of tenants in chief, both English king and Norman duke seem to have reserved to themselves the power of judgment on appeal or in the last resort. Only on this theory of amalgamation can we explain the fact that the early trials held in Norman times, such as that of Bishop William of St. Carileph (1088), show the judges to have been the *Witan* acting as a feudal court of peers ; while, further, as a curious anomaly, the English language, until about the reign of Richard I, continued to be used in the courts of law. But the court owed much to its foreign connexion. Its officials acquired Latin names, and its process of writs, though not unknown before the Conquest, was so largely developed as to be practically a new departure ;

Organiza-
tion for
Justice.

while inquest by sworn recognitors, and provincial visitation by royal judges, soon placed it beyond possibility of identification with early English methods and tribunals.

Harmonizing and defining work of Henry II.

It was, perhaps, not much more than a beginning of all these things that was made before the end of the reign of Henry I. English writers may have been prone to antedate the existence of departmental organization in the government. At any rate, the Exchequer system seems in its method of work to have been elaborately arranged. Moreover, a class of skilled officials had been created, who acted indiscriminately as judges of appeal or of review. But in this latter department the action of these officials as a body was hardly to be distinguished from that of the National Council, with which indeed for this purpose they were probably merged. With Henry II, however, came a real advance. The dislocation of government during Stephen's reign left him on his accession with a singularly fine field of work. The result is clear in every department of the government. But at first sight it does not seem to have largely affected the central organization. The two courts of Exchequer and Curia Regis remain, in the identity of their members, as closely united as before; but two important changes gradually emerge. On the one hand, the *Curia Regis becomes more definitely formulated*, in that its judicial action is distinguished from that of the National Council; for by 1164 the Constitutions of Clarendon bear witness to its separate existence. As a corollary, the *judicial aspect of the Council is now more prominent* than the financial; for the king acted personally in the Curia Regis, while he left the Exchequer to his lieutenant, the Justiciar.

The Court of King's Bench.

It will be well, then, for a moment to follow the development of the judicial side of the Royal Council. The organized Curia Regis appears under two aspects. In the *first* place, the work soon became so heavy that the king's great ministers of state gradually gave way to bodies of trained clerks, subordinate officials, but members of the Exchequer. They formed committees of the central court for the purpose of hearing cases, and to each of these committees was apportioned some part of the country. But in the *second* place, these officials came to exercise visitatorial jurisdiction in the capacity of Itinerant Justices. In this way, too, the central court was relieved by the

local visits of justices acting over limited and apportioned districts. But a further change was rendered necessary by the unwieldy size to which the Curia Regis grew. Owing to the increase of business the number of officials employed as justices was continually augmented, until by 1176 there were no less than eighteen; and the result of so large a central body has been described as 'entanglements in the business of the court and distress and expense to the suitors'.¹ The king determined, therefore, to create a central permanent tribunal, and for this purpose selected five of the already existing judges to form what came to be called *Curia Regis in Banco* or the permanent court of King's Bench. Those of the remaining judges who were retained, were confined to the work of the Exchequer and to their duties as Itinerant Justices. But the mere fact of giving a permanent organization to this side of the work of the Royal Council, placed it in an entirely different position. The Curia Regis formed no longer any part of the central administration: it acquired methods and rules of its own, and became a mere department amenable to the overshadowing influence of the personal council of the king.

¹ Stubbs,
Const.
Hist.
i. § 163.

Meanwhile, the Exchequer, to return to the other side of the Council's work, remained under Henry II with practically the same financial system as it had possessed under Henry I. It was the large general body of the royal officials, which met twice a year to receive the sheriff's accounts, and formed a rallying-point or the common ground on which all the members of the supreme judicature came together. At the same time, all suits concerning the revenue were heard before those members who were most familiar with financial work. In theory these were only a selection for each occasion from the whole body of barons or justices; but gradually and naturally they became *formed into a separate court*. The causes of this change can be briefly indicated. The misgovernment which characterized the reign of Henry III, threw the Exchequer system into great confusion. During the same period, the organization of the Commune Concilium took away its chief financial duties; while the permanent staff of the Common Law Courts filled those judicial duties of Itinerant Justices for which the officials of the Exchequer had been used. The result was that the old Exchequer was allowed to

The Court
of Ex-
chequer.

lapse; while those members who had heard cases about the revenue, became a permanent body of judges administering a special department of the Common Law.

The Concilium Ordinarium.

Its origin under Henry III.

Its definition under Edward I.

¹ *Essay on Privy Council*, p. 19.

§ 14. All the organization of the supreme court of Exchequer and Curia Regis had now in turn disappeared. There seems to have remained only a vague Court of Royal Audience, the king's wise men, Sapientes or Witan, consisting of his ministers and such others as he chose to associate with them. This undefined body first obtained definite form in the capacity of a Council of Regency when, during the minority of Henry III, it owed its appointment and summons, not to the personal will of the king, but to the nomination of the Commune Concilium. Thus it consisted of all the great officials of Church and State, who would have a natural claim to be consulted; while its power lay largely in its permanence, for it was the *Concilium Ordinarium et Perpetuum*, as contrasted with the intermittent sessions of the Commune Concilium. In the first two years of Edward I's reign, during his absence in Palestine, this council again acted as a Council of Regency. Edward on his return, like his father before him, accepted it and included it in that work of definition which he was applying to the legislative body of the Commune Concilium. For under Henry III, although the status of the Concilium Ordinarium was coming to be defined, yet the line between it and the Commune Concilium was in no sense tightly drawn. 'The king could do nearly every great act in his permanent council of great men which he could perform when surrounded by a larger number of his nobles' (Prof. A. V. Dicey¹). Such, indeed, had been the undefined connexion between the king's special body of ministers and the national assembly from the Norman Conquest onwards. But from the reign of Edward I the Concilium Ordinarium tended to become a separately marked off body of officials. Thus, Edward I imposed a special oath on the members of his Council and sent them a special summons: under Edward II a clerk of the Council was appointed: under Edward III are found special receivers of petitions for the Council; while in 1386 begin the Council's minutes of proceedings, and about the same period it acquired its best known name of the Secret or Privy Council.

But the mere organization of this body of royal advisers

had at once set it in antagonism to the national assembly. Already under Henry III the king strove to make the Council into a mere instrument of his will by filling it with his foreign favourites and dependants; and the representatives of the barons had responded by attempts to convert it into a mere committee of the Commune Concilium, by securing for that body a voice in the nomination of its members. When the Commune Concilium gave way to Parliament, complaints against the action of the Council were redoubled. The first attempts to check it were on the lines of the baronial policy under Henry III; for the appointment of the Lords Ordainers in 1311 aimed at taking the *nomination of members* of the Concilium Ordinarium out of the hands of the Crown. A newer means towards the same end was a *legislative curtailment of the Council's authority*. Among several statutes passed under Edward III with this object, may be noticed especially one of 1352 (25 Edw. III, st. 5, c. 4), which, aiming at the power of arbitrary imprisonment exercised by the Council, declared that 'from hence none shall be taken by petition or suggestion made to our lord the King or to his Council, unless it be by indictment or presentment of his good and lawful people of the same neighbourhood, &c.'

Attempts
to control
it.

By the end of the reign of Richard II we find the Council to have become an organized assembly of royal officials, existing at the pleasure of the king and *ipso facto* dissolved at his death. Like the old Curia Regis, it was at once the body of executive ministers and also the supreme court in judicial matters, uniting in itself the now inconsistent functions of the government which suppresses a riot and the court which tries the rioters. Indeed, its legal side was so prominent that out of term time it only took cognizance of such things as were absolutely necessary to be done.

Its position
as an instru-
ment of
the King

But the Council in its now formulated condition was not merely the instrument of the royal prerogative. Under favourable conditions it was a check upon the action of the king, 'a curb placed by the aristocracy on the arbitrary exercise of his will' (Prof. Dicey)¹. For it will readily be understood that certain hereditary officials, such as the Marshall and Chamberlain, would necessarily form part of every Council; while an equally necessary element would be a large number of bishops whose

as a check
upon the
King.
Privy
Council,
p. 29.

main claim to respect was independent of the king, although he was free to exercise his choice of members of his Council among the whole episcopal body. But again, although under Richard II and Henry IV the king's power was sufficient to ensure an annual re-appointment, and to include among the members no less than seven outside the ranks of nobility; under Henry VI and onwards, appointments seem to have been made for the king's life, and the number of commoners in the Council tended to decrease. Thus the Council imposed stringent regulations on the royal action, partly no doubt to protect the rights of the Crown, but chiefly perhaps to ensure that its members shall be consulted. As a result, no grants or expressions of the royal will were considered valid until there had been affixed to them the royal seal, whether it were the Great Seal of the Chancellor or the Privy Seal in the hands of a lesser official.

The Privy Council.

Under the Lancastrians.

Its power under control.

Under the Yorkists.

Revival of its authority.

§ 15. The mutual antagonism of Council and Parliament was, during the early years of the Lancastrians, temporarily dispelled. From 1400 to 1437 Council occupied that position of a committee wielding power delegated to it by Parliament, to which the larger body had more than once striven to reduce it. Henry IV, by nominating the members of the Council in Parliament, seems to have satisfied the extreme popular demand for election of ministers. But after 1437 Henry VI attained his majority, and under the influence of his wife, Margaret of Anjou, he nominated men who were not acceptable to the nation. The succeeding period was that of the Council's highest power; for it was not, as it came to be under the Tudors, overshadowed by the Crown, while the regulations which it had enforced as to royal grants and expressions of the royal will, placed at its disposal the unchecked exercise of the prerogatives of the Crown. It was perhaps owing to this resumption of its power by the Council, that the already growing distinction was emphasized between the Privy and the Ordinary Council. This seems to have become clear during the minority of Henry VI, when it was again performing the additional functions of a Council of Regency. Thus (1) as the administrative body, the Council would include all the great officials of state who were paid and whose regular attendance was demanded; while (2) as the Ordinary Council, it would include judges and other Coun-

cillors who would be summoned occasionally and for a special purpose. It is worth while to notice in passing that it was this full Ordinary Council which was really the Star Chamber, and which exercised the judicial side of the Council's authority. The Council had always done its work by committees, but the Privy Council may be regarded as the first permanent committee of the body. This system was much further developed under the Tudor sovereigns, and was rendered necessary by the increased activity of their government.

With the accession of the Tudors the Council entered on a new phase of existence. The period between 1485 and 1640 has been described as the age of government by Councils. After the fall of the Lancastrians the position of the Council underwent a great change; for, owing to the destruction of the power of the nobility in the Wars of the Roses, it ceased to be a check on the royal will, and sank into a body of officials. But as its independence lessened, its powers increased. The political authority which it exercised in the fifteenth century, remained untouched; while its legal side was greatly enhanced, and its legislative activity almost superseded that of Parliament itself. Thus (1) every opportunity was seized to *subject outlying parts of the kingdom to the Council's direct control*, as Ireland by Poynings Act of 1494, and Jersey and Guernsey during the same reign of Henry VII. It was with the same object that special Councils were erected for the government of different parts of England itself. Such were the *Council of the North*, which was called into existence after the Pilgrimage of Grace in 1536; and the *Council of Wales and the Marches* established by Edward IV in 1478 for the management of the southern and the border counties of the principality. Of similar effect, though older in origin, were the Council of Calais, the Stannaries Court, and the governments of the various Palatinates. The extent of this special jurisdiction may be gathered from the assertion that one-third of England was thus withdrawn from the protection of the Common Law. A parallel case is to be found in the Forest Courts of an earlier date. Again (2) there was a constant attempt on the part of the Tudors to *extend the legislative powers of the Council* through the use of Proclamations. These were temporary enactments like the earlier Ordinances,

Under the
Tudors.

Extension
of its
authority.

issued by the king with the advice of his Council. They were, under the Tudors, defined by the lawyers as intended to explain or call attention to ambiguous or obsolete statutes; but the sovereigns did everything in their power to endow them with the full force of parliamentary laws. But (3) the great aim of the royal policy was to *place the law courts generally under the influence of the Council*. This was attempted in two ways; (a) new Courts were erected composed chiefly of Councillors and acting under the supervision of the Council. Such were the Courts of *High Commission*, which will be fully dealt with elsewhere; of *Requests*, formed under Henry VIII as a minor Court of Equity to hear 'poor men's complaints,' but only lasting until 1598, when it was upset by an adverse decision in the Court of Common Pleas; of *Augmentations*, for dealing with the confiscated monastic property; and of *Wards*, set up by Henry VIII for the better exaction of the feudal dues.

Most important of all was the direct extension of the judicial authority of the Council, which took place through the (b) growth of the *Court of Star Chamber*. It has been shown that when, under Henry VI, there appeared a distinction between the *Privy* or Inner and the *Ordinary Council*, the judicial functions of the Council were exercised by the larger body. When occupied in this business the Council came to be called, from the room in which it sat, the Court of the Star Chamber. Thus the Act of Henry VII (3 Hen. VII, c. 1), to which its origin has generally been ascribed, merely regulated a certain portion of the Council's judicial authority, the unregulated exercise of which was perhaps felt by Parliament to be necessary but dangerous. It is thus to be paralleled to the Act of 1539, by which the Parliament, while apparently giving to the king's proclamations the force of laws, in reality by important provisos regulated the use of a power which would in any case have been employed by the Crown. The seven persons, then, enumerated in the Act of Henry VII—the Chancellor, Treasurer, Keeper of the Privy Seal, a Bishop, a temporal Lord and two Chief Justices, to whom Henry VIII added the President of the Council—formed a judicial committee of the Privy Council, which should take cognizance of 'unlawful maintenances, giving of licenses, signs and tokens, great riots, unlawful assemblies,' and all offences

Its judicial activity.

The Star Chamber.

against peace and order, which were too great to be dealt with by the ordinary local tribunals. This remained a separate committee or Court, certainly till 1529, and perhaps later; but towards the close of Henry VIII's reign, the special commission created under Henry VII merged in the general authority of the Council, and powers much wider than those conferred by the Statute were exercised by the Star Chamber, which in fact then became, what it had been under Henry VI, the whole Council sitting in its judicial capacity. But this coincidence is not for long, and, although it is impossible to trace the change, by the end of Elizabeth's reign the Star Chamber was a separate judicial body from the Council. Thus, while on the one side the Star Chamber contains all members of the Council together with two judges who are not of that body, and offers some resemblance to the older Magnum Concilium; on the other side, the Privy Council seems to content itself with relegating to the Star Chamber the more serious offenders whom it had thought fit to summon to its presence.

The methods of procedure adopted by the Star Chamber ^{its pro-} serve to illustrate its enormous power. It might proceed ^{cedure.} either *Ore tenus*, that is, on common report or secret information, in which case a man was privately arrested, put to examination and, if he confessed his guilt, was promptly punished. Or an action might be begun by *bill of complaint signed by a single Councillor*. In this case the accused was summoned and bound to answer on oath. His refusal was visited with imprisonment; and if he persisted, his silence was treated as guilt, and he was punished accordingly. Such punishments included anything short of death, the most favourite of them being heavy fines, whipping and branding. But perhaps even worse was the prerogative power exercised by the Star Chamber, of extorting confession by torture. Nor was this, as might be supposed, of rare occurrence, although it was strictly illegal by the Common Law. Moreover, the influence of this celebrated court would be entirely misunderstood, if it were supposed that it confined its attention only to matters of great moment. It meddled in all the affairs of private life, as well as in public concerns, and, not content with the control of the press and interference with cases before the courts of law, did not think it incompatible with its dignity to reconcile a husband and wife,

and in general to assume to itself the duties of a public censor. But so greatly had it lost sight of the original object and only justification for the use of such power, that a recent writer has, without much exaggeration, declared that 'by the end of Elizabeth's reign it had ceased to render help to the poor or the weak, or to remedy the uncertainties or inadequacy of the Common Law' (Sir W. Anson¹).

¹ *Law and Custom of Const.* ii. 90.

Its administrative work.

To return to the development of the Council in its administrative capacity. Under the Tudors the Council was all powerful. Two chief points call for notice. In the *first* place, it became a much larger body, numbering, as we find at the beginning of Edward VI's reign, no less than forty members. This body was divided into six committees for different branches of the Council's work; but one of these, that of the State, seems to have been so much more important than the others, that it probably consisted of the privy as opposed to the ordinary councillors, a distinction which must have increased rather than diminished since the time of Henry VI, and would account for the fact that Henry VIII on many important occasions acted without the concurrence of his Council. The *second* important point is that *the king acted through his secretaries* in preference to other councillors.

Origin of Secretaries of State.

The office of king's secretary or clerk dates from the reign of Henry III, when its holder formed part of the royal household, and took over some of the work which had hitherto been discharged by the Chancellor and his clerks. At first the office conferred no political influence; but in the fifteenth century its holder was made responsible for the use of the signet. It was under the Tudors that the secretary became a great political officer. Since 1433 there seem to have been two secretaries. They now ceased to be officers of the household: the post was given to men of distinction, who became *ex officio* members of the Council. Under Elizabeth they were first called Secretaries of State, and one of them became the exponent of the royal will in the House of Commons. When we turn to the Stuarts, we note a manifest though gradual *decline in the authority of the Council*. As far as outward signs went, it was never so powerful as at the beginning of the seventeenth century; at any rate it was never so assertive. But there are manifest proofs that it was unequal to its work, and could not cope with the new difficulties which

had arisen from the position taken up by Parliament. Thus the Council under Charles I reverted to the custom of the Yorkists, and contained a large number of nobility; while a prominent place was given to the bishops. Together with this anti-popular movement went a great decline in administrative talent. The secretaries were no longer men of first-rate ability, such as Thomas Cromwell and Sir William Cecil, but mere creatures of the king, a Sir John Coke or a Windebank, whom the Commons in their constitutional debates overrode or ignored. Moreover, however separate they may have kept their action, the Council and Star Chamber were identified in the popular mind. Thus the Council was indirectly aimed at in the discussions raised by constitutional lawyers on the origin of the Star Chamber. Under theories of its origin lay protests against its overweening power; and the generally accepted assertion that its authority was founded on the Act of Henry VII, meant that its power was not legal, but an undue delegation of the royal prerogative. Consequently, in 1641 one of the first acts of the Long Parliament was the abolition of the Star Chamber and all the kindred courts¹; so that when, after the Restoration, the Privy Council was revived, it was practically shorn of its judicial power, and remained a purely political and administrative body.

§ 16. But it was thus robbed of that which had formed its essential and peculiar character. It now became large and merely honorary. The distinction between the effective and honorary members of the Privy Council was as old as the Council itself. It was a natural division; for it represented those whom the king chose to consult, and those whom it was impolitic to omit from his counsels. The first body would naturally be composed of the holders of ministerial office; but the latter would claim to be present at the royal Council board.

During the political complications of Charles I's reign there are traces that the two bodies were drifting more widely apart. This became increasingly clear when at the Restoration the old Privy Councillors were retained, many of whom had taken part with the Commonwealth. The division of the Council into *committees for purposes of administration* was no new thing. Under Charles I are found at various times an Irish committee (1634), a special committee for Foreign Affairs, and a Scotch committee (1638). Possibly at Clarendon's suggestion this system was

¹ Gardiner, *Const. Docts. of Puritan Rev.* pp. 106-115. The Cabinet.

Its origin under Charles II.

revived. The most important of the committees now established, was one for Foreign Affairs; and it is to this, (which after Clarendon's flight accidentally conferred an undying reproach upon the word 'Cabal,') that the origin of the later CABINET is generally traced. But it seems that there was a further and *purely informal committee* with which the king conferred on his most secret affairs, and which 'was distinct alike from the Foreign Committee, and from the entirety of the Privy Council' (Sir W. Anson¹). It is, however, important to notice that all real affairs of state were placed before the *full Council*.

¹ *Law and Custom of Const.* ii. 96.

Temple's scheme.

But Clarendon's system of committees had not solved the whole question of administration. Indeed, it did not touch the most important question of all, that of harmonizing the relations of the executive and the legislature. The impeachments of Clarendon and Danby, and the king's attempt to shield the latter by the grant of a pardon while the trial was impending, showed the necessity of arriving at some solution, unless at every disagreement recourse was to be had to desperate remedies. It suited the king to assent to a *scheme attributed to Sir William Temple*², by which the Privy Council should consist of thirty members, half of them great officers of state, the other half independent members of both Houses whose joint incomes should equal that of the whole House of Commons. All should be equally entrusted with every secret of state, and the king should do nothing without their advice. The scheme was a compromise between the king's right to appoint ministers and the exercise of Parliamentary control by calling those ministers to account. But it was bound to failure; for not only did it reproduce the fault of the constitutional lawyers of the Great Rebellion, and of Cromwell's constitutions, in that it was based upon the idea of a balance of power between executive and legislature; but, practically, the numbers were too large for administration, and nothing secured the unanimity of the members. Moreover, the king was not ready to resign so much of his prerogative as was implied in the continual consultation of this body. He still acted on the advice of a small number of personal friends, of whom Sir W. Temple, inconsistently enough, consented to be one; and before the end of the same year he had dissolved one Parliament

² Christie, *Shaftesbury*, ii. 325-6.

against the will of the Council, and another without asking its advice at all.

The ultimate solution of the question between executive and legislature was only reached at the Revolution of 1688, when the Bill of Rights deprived the king of the undue exercise of his royal prerogative ; and the custom of an annual Mutiny Bill and Appropriation Bill ensured the regular summons of Parliament, and rendered it impossible to maintain a body of ministers who were not acceptable to the majority in the legislative assembly. But William struggled hard against this conclusion. He not only used every influence at the disposal of the Crown, by the distribution of offices and pensions, to obtain a permanent majority of members favourable to his wishes ; but he even himself undertook the management of foreign affairs, and induced the Lord Chancellor Somers to affix the Great Seal to a blank paper, on which was subsequently inscribed the first Partition Treaty with Louis XIV. Lord Somers' consequent impeachment, notwithstanding his acquittal on technical grounds, led to the insertion of two clauses in the Act of Settlement designed to secure the responsibility of ministers, which Danby had tried to evade by pleading the royal command, and Somers by claiming the connivance of a Secretary of State. The eighth clause enacted that no royal pardon should be pleadable to an impeachment: the fourth clause provided that after the accession of the Hanoverians all resolutions of the Privy Council should be signed by the members responsible for them ; while, finally, the sixth clause excluded from the House of Commons all holders of offices or pensions from the Crown. But the two latter provisions were soon proved to be far too stringent. No one would have undertaken the duties and responsibilities of Councillorship on the terms proposed ; while the exclusion of all ministers would have placed the executive and legislature in hopeless conflict, and would have turned back the constitutional current beyond hope of recovery. They were, therefore, repealed in the reign of Anne (1705), although two years later the 'Act for the Security of Her Majesties Person, Government, and Succession' supplied important limitations to the exercise of royal influence within the House of Commons. By it all persons were incapacitated from sitting in the House of Commons, who should hold either any office created since

The
Cabinet
under
William
and Anne.

4 & 5 Anne,
c. 20.

6 Anne,
c. 41.

October 25, 1705, or a pension at the pleasure of the Crown ; while any member on being appointed to an already existing office, should vacate his seat and subject himself to re-election.

Under the
early Hano-
verians.

¹ *Law and
Custom of
Const. ii.*
99.

Such was the result of an attempt to secure by legislation ministerial responsibility to the popular branch of the legislature. 'Nothing, therefore, but custom, based on practical convenience, has worked out the transition from government by the Crown in Council to government by a Cabinet consisting of ministers indicated by the Commons ;—from the legal responsibility of the individual Privy Councillor to the moral responsibility of the collective Cabinet' (Sir W. Anson¹). This corporate responsibility, which is of the essence of the cabinet system, came chiefly as a result of the growth of the office of Prime Minister. The Justiciar, the royal lieutenant of Norman and early Angevin times, was, about the time of Edward I superseded by the Chancellor as the great political officer of the Crown : and he in his turn gave way under the Tudors to the Treasurer, who was on the whole the chief minister until the accession of the House of Hanover, when the office was put into commission. At the same time no minister, however prominent, had the choice of his colleagues or a decisive voice in measures. Between the Revolution of 1688 and the accession of the Hanoverians there are three instances of a homogeneous ministry ; but the Whig Junto, which William III nominated at the advice of Sunderland to put vigour into the war with France, was without a leader, for Sunderland himself was only Lord Chamberlain and that for a year : Godolphin, under Anne, had for some years to put up with Tory colleagues ; and the Tory ministers who gradually superseded his party were appointed by the queen without consulting him.

Attempts
of the king
to keep a
hold on the
Cabinet.

The truth was that, while circumstances had, since the Revolution, made the Cabinet 'the motive power in the executive of the country' (Sir W. Anson), and that it, therefore, and not the full Council, now had the decisive voice in the conduct of affairs, the king sought every means whereby he might retain at any rate a veto on the action of unacceptable ministers. As he tried to influence Parliament itself by the multiplication of places and pensions and by direct bribes to the members, so he strove to keep the Cabinet in order by *including among its members devoted personal followers of the king*. Thus, from the reign of William III onwards, besides

the committees, either permanent or temporary, which did the work now done in the Foreign Office, the Home Office, and the Board of Trade, we find not only the whole Privy Council which was assembled for formal business, but also a twofold Cabinet—an *outer* cabinet including the great officers of the household, such as the Lord Chamberlain and the Master of the Horse, and non-political officers of State, such as the Archbishop of Canterbury and the Lord Chief Justice; and an *inner* cabinet which commanded the confidence of the House of Commons and therefore really settled the policy of the country. It is true that with the accession of the Hanoverians the king disappeared from Cabinet Councils, and a first minister became both necessary and possible. But, as a matter of fact, the withdrawal of his personal influence made it doubly necessary that he should retain an indirect hold over the deliberations of his ministers. Even Walpole, who was perhaps in any modern sense the first Prime Minister, could not nominate his own colleagues, and was obliged for years to tolerate dissensions in his Cabinet; while the personal interference of George III, exercised in direct and indirect ways alike, completely threw his ministers into the background. The existence of this double Cabinet explains the action of ministers of the eighteenth century in repudiating responsibility for measures carried out by Cabinets of which they are members; nor is it less easy to understand how the king, by intriguing with the titular colleagues, was able to maintain his own nominees in the Cabinet and to thwart the action of ministers. Burke might declaim as he would against the cabal which had been formed 'to intercept the favour, protection and confidence of the Crown in the passage to its ministers,' and whose members, while not aiming at 'the high and responsible offices of the State,' take delight 'in rendering these heads of office thoroughly contemptible and ridiculous'.¹ It was the king himself, and not, as Burke pretended, a Court faction that was to blame.

¹ *Thoughts on Present Discontents.*

Indeed, so long as this personal interference of the Crown lasted, the growth of corporate responsibility among the members of the Cabinet was impossible; and it was in any case against the interest of the Crown. The ultimate establishment of the principle was due to its compulsory recognition by the king in a few isolated instances. Thus, in 1746 the Pelhams,

Establishment of corporate responsibility.

who were in office, took a most unpatriotic advantage of the Jacobite Rebellion, and by resigning in a body forced the king to admit William Pitt to office. In 1763 Pitt himself followed this up by refusing to take office except in a Cabinet of his own composing, and thus obliged the king to continue the Grenville-Bedford section of the Whigs in power. But the first definite recognition of this corporate responsibility may be said to date from 1782, when the party led by Lord Rockingham did away for the time with their titular colleagues, and the ministry consisted only of eleven persons, all of whom held high political posts and were cognizant of all measures taken. The system of a double cabinet was, however, only gradually abolished. In the Lord Chancellor especially the king attempted to maintain a permanent spy upon the other ministers. Thus, in 1792 the persistent opposition of Lord Thurlow, who had been Lord Chancellor with one short interruption since 1778, forced the younger Pitt to offer the king an easily chosen alternative between his own resignation and that of the Chancellor. The first principle dealing with the titular cabinet was formulated in 1801, when Pitt's Chancellor, Lord Loughborough, claimed to remain, though without office, in the Cabinet of his successor. Addington met his pretensions with a statement that 'the number of cabinet ministers should not exceed that of the persons whose responsible situations in office require their being members of it.'

Reluctance
to acknow-
ledge a
Prime
Minister.

But the difficulty lay not only with the king's desire to make the ministers feel his power, but with the extreme reluctance of the ministers to submit themselves to the overshadowing authority of a Prime Minister through whom alone such moral responsibility could be realized. Walpole himself definitely repudiated the title; and, despite the instances just mentioned, when in 1806 objection was taken to the appointment of Lord Ellenborough, Chief Justice of the King's Bench, to a seat in the Cabinet, on the ground that he might be at once prosecutor together with the rest of the Cabinet and judge, the other ministers refused to accept this plainly stated doctrine of mutual responsibility. Indeed, so essential was it before the Reform Bill that the head of the Ministry should possess the confidence of the king, that the real leader of the government often held a subordinate office, while the first Lord of the Treasury, like the

Dukes of Grafton and Portland and the Marquis of Rockingham, were but the nominal leaders.

It was only with the abeyance of corruption and the formation of strong parties over the question of Parliamentary Reform that cabinet government, as we know it, can be said to have been attained. The result has been that the general direction of the policy of the country is at any given moment in the hands of a body of men, who are each individually the heads of the chief departments of the executive government, and are collectively the nominees of one of their number, the Prime Minister, who commands the confidence of the majority in the House of Commons and with whom, no matter how successful their own administration, they stand or fall. Thus, while on the one side the method by which the Cabinet is formed ensures an unanimity in its advice to the Crown and a secrecy in its deliberations, on the other side its individual members, as heads of departments, have direct communication with the sovereign, whose concurrence moreover is necessary for their dismissal. Its exact restraining power on the Crown in this respect differs with the influence of each Prime Minister who, however, in any case can force the king's hand by the alternative of his own resignation. With the final extinction of the double cabinet, too, the attitude of the Crown towards its ministers has been defined, and it has become an accepted principle that the king must neither take advice from others than the Cabinet, nor act without their concurrence, nor refuse his support so long as the ministers retain the confidence of the people. For although the legal responsibility of each minister can only be enforced through his position of Privy Councillor, the Cabinet is not the Privy Council. This body consists of no less than three sets of members—the Cabinet for the time being and members of former Cabinets; the holders of great offices of state unconnected with politics; and eminent men on whom the rank is conferred as a compliment. Thus only in a very general sense can the Cabinet be even called a committee of the Privy Council; for it is unknown to law, its numbers and qualifying offices are indeterminate, and of its deliberations no record is preserved.

The relation of the Cabinet to the Commons has undergone considerable change. Before the Reform Bill a minister who

Relations
of the
Cabinet
(a) to the
Crown.

(b) to the
Commons.

enjoyed the confidence of the Crown could use all those means at the king's disposal to procure a majority. From 1832 to 1867, the date of the second Reform Act, ministers did not retire until they had faced the new Parliament and been definitely defeated. Since 1867, with the exception of the election of 1892, the verdict of the country at the polling booths has been so clear that a Cabinet to whom it has been adverse has not waited for the assembly of Parliament in order to make way for one which will command a majority in the new House of Commons. Such is the Cabinet system as it has worked itself out in two centuries. The lateness of its recognition may be gathered from the fact that Burke is the first writer who mentions it, while the founders of the American Constitution gave it no place in their polity. Meanwhile, certain tendencies may be noticed which are not unlikely to work a transformation in this mode of administration. The Cabinet itself is becoming so large from the increasing number of departments whose heads must be included within it, that the real decision of policy seems to rest with an inner body of the three or four most indispensable members. At the same time, the ever-increasing interference of Parliament with the administration cannot but be viewed with alarm by all who appreciate the necessity of prompt and vigorous action. And this tendency to minute criticism on the part of the Commons, intimidates all but the strongest ministers, the very contrast of whose position with that of their colleagues places a popular favourite in an almost dictatorial position. Thus, finally, it is the people and not Parliament, the polling booths and not the lobby, which appoint the Prime Minister and even nominate to him some of his subordinates: and a doubt may perhaps be allowed whether a *plébiscite* of this character, and even of this size, is not as liable to sudden whims and inconsiderate action as the single chamber which political philosophers and practical statesmen alike deprecate.

The
modern
depart-
ments of
Govern-
ment.

§ 17. Both the existence of the Cabinet and the large number of its members bear witness to the continually increasing subdivision of the functions of government. Administrative offices, from the standpoint of the present day, may be divided into three classes. The *first* of these consists of two great offices which are now put into commission. The Admiralty,

which has succeeded to the work of the Lord High Admiral, is dealt with elsewhere. The *Treasury* has a longer history. The *Treasurer* was originally the custodian of the royal hoard at Winchester. As an officer of the Exchequer he received the accounts of the sheriffs and appointed officers to collect the revenue. He was, however, subordinate to both Justiciar and Chancellor, until the separation of Chancery from the Exchequer under Richard I removed him from the influence of the latter, and the abeyance of the Justiciarship under Henry III freed him from the former. The separation from Chancery necessitated the appointment in Henry III's reign of a Chancellor of the Exchequer, who should have charge of the seal of the Exchequer, which in Exchequer business took the place of the Great Seal of the Chancellor. Under Edward I the appointment of a Chief Baron relieved the Treasurer of the judicial business of the Exchequer, and he gradually became a great political officer, until under the Tudors, with the more dignified title of Lord High Treasurer, he superseded the Chancellor as first minister of the Crown. The two great holders of the office were Lord Burleigh and his son, the Earl of Salisbury. On the death of the latter in 1612 the Treasury was put into commission and was gradually separated from the Exchequer. Until the resignation of the Duke of Shrewsbury in 1714 individuals were still occasionally appointed to the office: since then it has always been in commission. Previous to 1711 the Crown nominated all the Lords of the Treasury: since then this has been the privilege of the First Lord, who with few exceptions has also filled the office of Prime Minister. The exceptions have been created either by a rivalry in the Cabinet, which caused the real leaders to take subordinate offices under mere figureheads such as Lord Wilmington (1742) and the Dukes of Newcastle (1754) and Portland (1807); or by a desire on the part of the real chief to take a less arduous, as in the case of Chatham, who was Lord Privy Seal (1766), or a more congenial post. Thus, Fox in 1806 and Lord Salisbury in 1885 and 1887 preferred the office of Foreign Secretary.

A second class of administrative offices is formed by those which may be described as *in theory Committees of the Privy Council*. Of these there are five. (1) The *Board of Trade*

The Treasury.

Nominal Boards.

finds its origin in two councils for Trade and for Plantations established by Charles II on his accession by commissions under the Great Seal. They were united in 1672 and extinguished in 1675. In 1695 this joint board was revived; and on its abolition in 1781, as both costly and inefficient, its place was taken by a committee of the Privy Council. In these two councils may also be seen an anticipation of the office of the Secretary of State for the Colonies, to be mentioned presently. (2) The *Board of Works* succeeded in 1851 to the supervision of public works and buildings which had since 1832 been held by the administrators of Crown lands, commonly known as Commissioners of Woods and Forests. (3) The *Local Government Board* was created in 1871 and took over the duties of the Poor Law Board, of the Home Secretary in respect of local government, and of the Privy Council in connexion with public health. More recently the County Councils have been placed under its central control. (4) The *Board of Agriculture* was formed in 1889 and took the powers exercised in this respect by the Privy Council and the now extinct Land Commissioners. (5) The *Committee of Council on Education* was established in 1856. When in 1830 the first annual sum was granted by Parliament in aid of education, it was administered by the Treasury. In 1839 an increased sum was given to the care of a committee of the Privy Council which speedily became a department and gained permanence by the power, bestowed by statute in 1856, to appoint a Vice-President of the committee who should be under the (not entirely) nominal headship of the President of the Council. This has prevented the Education Department from becoming independent, and has kept it as a real committee of council. In all the four previous cases the boards consist of a head and a small number of high officials. Thus the Local Government Board is composed of the Lord President of the Council, the Secretaries of State, the Lord Privy Seal and the Chancellor of the Exchequer in addition to its own President. But in all four cases the board is merely ornamental, and the whole work is done by the respective heads—the Presidents of the Boards of Trade, Local Government and Agriculture, and the First Commissioner of the Board of Works.

The *third* class of offices consists of the five *Secretaries of State*. The origin of the office has been already noticed¹.

¹ p. 88.

Until the end of the eighteenth century there were generally ^{The} two Secretaries of State; although between 1707 and 1746 ^{Secretariat.} a third was appointed for Scotch affairs, and from 1768 to 1782 Colonial matters were given to a specially appointed Secretary. After the Revolution of 1688 the work was divided between a northern and a southern department, the latter including Ireland, the Colonies and home affairs. In 1782 the northern department became in name what it had been in reality, the *Foreign Office*; while the southern department as the *Home Office* still dealt with Ireland, the Colonies, and some part of the management of the army. In 1794 the exigencies of the War of the French Revolution caused the appointment of a special Secretary of State for *War* to whom in 1801 was transferred all business connected with the *Colonies*. So it lasted until the Crimean War, when, in 1854, the Secretaryships for War and the Colonies were separated. The last addition to the secretariat was caused by the transference of *India* to the Crown in 1858. Theoretically the division of the secretariat is a mere matter of administrative convenience. Every one of the five is equally capable of discharging the duties connected with any of the four departments other than his own. But the Home Secretary is the principal Secretary of State, and as such has, in addition to the general supervision of law and order within the United Kingdom, certain ceremonial relations to royalty itself. Three secretaryships of a lesser degree of importance may be noticed in this place. The Secretary at War lasted from the beginning of a standing army under Charles II until he was merged in the more recent but greater Secretary of State in 1855. The Irish Act of Union in 1801 made the Chief Secretary to the Lord Lieutenant the principal medium of communication for Ireland, and although recent circumstances have exalted the holder of the office to Cabinet rank, technically the Home Secretary still remains responsible for Irish affairs. A separate Secretary for Scotland was only appointed in 1885, but is not, like his temporary predecessor for forty years after the Scotch Union, necessarily a member of the Cabinet.

Two other classes of ministerial officials demand a passing notice. A Cabinet always includes one or two of what would elsewhere be called 'ministers without portfolios,' that is, the

Other
changing
offices,

holders of practically *honorary offices* whom, for one reason or another, it is desirable to place at the centre of the administration. Such are the Lord President of the Council, and the Lord Privy Seal, necessarily members of the House of Lords, and the purely local Chancellor of the Duchy of Lancaster. A second class is formed by the *Law Officers of the Crown*—the Lord Chancellor, for whom has sometimes been substituted a Lord Keeper, who, although President of the House of Lords, is not a member of it; the Attorney General, who dates back to Edward I; and the Solicitor General, originating under Edward IV as the royal adviser in matters connected with Chancery business.

The Cabinet and the
permanent
Civil Service.

All the officials enumerated above are ministerial; that is, although not all necessarily and some never members of the Cabinet, yet they all change with a change in the government. The necessary members of a Cabinet would seem to be the First Lord of the Treasury and the Chancellor of the Exchequer, the Lord Chancellor, the First Lord of the Admiralty, and the five Secretaries of State. All these, and indeed all ministers, must now almost of necessity sit in Parliament. The last instance to the contrary was Mr. Gladstone's retention of the Colonial Secretaryship for six months in 1846 owing to his failure to obtain the necessary re-election after his appointment to an official post. For upon the various heads devolves the duty of defending their respective departments from criticism in Parliament. The policy of each department is settled by its temporary chief; but the executive work is done by a large permanent staff, who are admitted partly by patronage but chiefly by competitive examination, who do not change with the government, and who represent the specialized knowledge and the traditions of management connected with each individual department. All these officials are by statute excluded from seats in the House of Commons.

CHAPTER III.

THE LEGISLATURE.

Witan, Commune Concilium, and the House of Lords.

§ 18. AN acute historical observer has told us that mankind owes its freedom from the bonds of archaic custom to a government by discussion¹. It is, then, to the kind of assembly by which such discussion was encouraged that we must turn in order to discover the principles of national progress. We are wont to regard legislation as the chief work of our modern Parliament; but law is a comparatively late growth in the record of a nation's history. Sir Henry Maine has described the transition from the 'separate, isolated judgments' of a divinely descended king to the customary law maintained by the memory of a religious or political aristocracy, and so to the period when the diffusion of the art of writing suggested the formation of a legal code². It is in the second of these periods that the age of discussion begins; and it is by means of this discussion that the customs are preserved as a useful check on the anarchic elements of the rudimentary stage of life; while they are insensibly but appreciably modified into a means of national advance. The earliest records of the English tribes recognize the existence of government by discussion. The majority of the tribes who came under Tacitus' observation were not under kingly rule; but whether they were monarchical or not, the power was equally wielded by the tribal assembly, and it is especially noteworthy that, while the *principes* or chiefs care for smaller matters, all important affairs are decided in the general assembly, which consists of the whole body of free warriors. Here, besides the general power of deliberation over matters of moment, the king, in a monarchical tribe, and the *principes* or administrative officers of the

Origin of
the Witan.

¹ Bagehot,
*Physics
and
Politics*,
p. 158.

² *Ancient
Law*,
chap. i.

divisions of *vici* and *pagi*, would be chosen, and all judicial cases would be heard, whether on appeal, or in which a great man was concerned.

Connexion
between
the Witan
and the
folkmoor.

¹ *Const.*
Hist. § 51.

² *Hist. of*
Eng. Const.
i. 99.

³ *Essays*,
4th Series,
pp. 444-7.
⁴ *Saxons*
in Eng-
land, i.
203-230.

Compo-
sition and
Powers of
the Witan.

In the lapse of centuries the positions were exactly reversed. The committee, so to call it, of *principes* developed into the WITENAGEMOT or council of wise men, with whom, in conjunction with the king, lay the decision of all important matters. Whether any power remained to the general body of the freemen—the folkmoor, as it was called, is a point of considerable dispute. Dr. Stubbs¹ believes that in the small kingdoms of the so-called Heptarchy there was in each a Witan and a folkmoor, and that as each small kingdom became conquered by a larger neighbour, its Witan disappeared or was absorbed in that of the greater power, while its folkmoor remained in the slightly altered position of a shiremoor.

Dr. Gneist², on the other hand, is of opinion that, in the smaller kingdoms at any rate, the Witan and folkmoor were practically identical. Mr. Freeman would prolong the council described by Tacitus. 'The ancient Mycel Gemot was a body in which every freeman of the realm had, in theory at least, the right to attend in person,' which right, he adds, 'simply died out in practice and was never formally taken away.' He instances 'the many passages in our early writers in which very popular language is used, those in which the gathering of great crowds is spoken of,' and adds, 'there is nothing wonderful in supposing that the great mass of the qualified members of an assembly habitually stayed away; it is much harder to believe that ever and anon crowds of unqualified persons thrust themselves into an assembly in which they had no right to appear at all.'³ Mr. Kemble, whom Mr. Freeman has followed, collected scattered notices of over 140 meetings of the Witenagemot between 596 and 1066⁴; but nearly all the passages which refer to meetings of a popular body, are concerned with the election of kings and the promulgation of the laws, matters to which the assent of the populace would wisely be invited.

It is, then, probably true to say that the Witan introduced a new idea. It is not, like the *concilia* of which Tacitus speaks, the nation assembled in arms; it is the wise men of the nation coming together for deliberation: 'not a collection

of representatives, although it represents the people¹. The ¹ Stubbs, *meetings* were held, at any rate in the later days of Anglo-Saxon rule, at regular times, probably, from the dates of documents and charters, at the three great Church festivals of Easter, Whitsuntide, and Christmas. The *members* of the ordinary assemblies were the royal family, the national officers both ecclesiastical and civil, such as bishops (to whom were later added a number of abbots), ealdormen, and finally *ministri* or royal nominees. These latter would include persons in all kinds of relations to the king, and the increase or diminution of the royal power can probably be marked by an increase or diminution in the number of *ministri* who attest the acts of the Witan. Thus a powerful king would balance the influence of the national officers with a sufficient number of his personal friends. For, although he might be able on occasions to override the decisions of a hostile Witan, it was strongly in accordance with custom that he should act with and through his councillors. Indeed, although it lay in the power of the Witan not only to elect the king, but even as a last resource to decree his deposition, the authority of the elected king was coordinate with that of the electing body. In *legislation*, the king, following the 'traditional theory of all the German races,' enacted all laws, ecclesiastical no less than secular, with the counsel and consent of his Witan. Until quite the end of the tenth century no *taxation* was required, but the first levies of the shippgeld and danegeld were raised by authority of the Witan. As a deliberative and *administrative* body, the Witan was called upon ordinarily to witness, and thereby nominally at least to assent to grants of land, and to take a definite share in the more momentous questions connected with peace and war. The purely official members, the bishops and ealdormen, were with certain restrictions elected, or more strictly coopted by the existing members of the Witan. Finally, this legislative and administrative body, in defiance of modern theories of division of powers, acted also as the supreme court of *justice*, whether in the last resort or in cases where otherwise it would have been difficult to bring offenders to justice. Such was the council by which William the Conqueror was elected to the vacant throne.

Now, the natural council for a Norman sovereign would

The Witan
of the
Norman
kings.

have been a council of tenants-in-chief who, in the feudal theory, had a right to be consulted by their lord. But William, in his desire to avoid the sway of feudal influences in the government, determined to perpetuate, among other things, the old English Witenagemot, with its qualification of official wisdom. At the same time, he so far yielded to the influence of feudal ideas as to add to the old qualification of official wisdom the new feudal status of tenure-in-chief; for, in his anxiety to find a balance for the feudal barons, he made the bishops do homage for the lands of their sees and so hold them on a feudal tenure. By this means the king was able to exercise as much of a choice among his tenants-in-chief as is implied in the formula that, while all members of the Witan were tenants-in-chief, all tenants-in-chief were not entitled to come to the Witan; in other words, the Witan remained what it had previously been—an assembly of magnates. It is, however, important to notice that this new feudal qualification did not entirely wipe out the old title based on official wisdom; for the king from time to time brought to the assembly other councillors, such as Papal legates and bishops from his foreign dominions, whose only claim to be present would rest upon the royal summons. It is scarcely likely that these additional councillors would be allowed to vote. Such a limitation, however, did not apply to the bishops, who, despite their new baronial position, yet maintained their seats in the Witan on the original status of official wisdom. For, the lawyer Glanvill, who wrote after the compact of 1107 between Henry I and Anselm, while acknowledging that bishops-elect before consecration are accustomed to do homage, allows that an already consecrated bishop does not do homage for his barony to a new king, but takes an oath of fealty¹. Again, the writ of summons to a council addressed to a bishop required his presence 'on his faith and love' (*fide et dilectione*), in the place of the 'faith and homage' (*fide et homagio*) of the temporal lord; while, during the vacancy of a bishopric or the absence of its occupant, the guardian of the see was called to represent the spiritual interests of the diocese. There is no need to multiply proofs. The Witan of the Norman kings was no more based solely upon tenure-in-chief than is the modern House of Lords upon hereditary peerage;

¹ *Sel.
Chart.*
p. 163.

although in each case the qualification mentioned might well be quoted as the chief characteristic of the majority of the members.

But we must be careful not to antedate the formulation of its composition. government or the differentiation of functions. Dr. Gneist with much truth accuses English writers of an attempt to find under the Norman kings a much more highly developed form of government than the evidence will warrant¹. It is sufficient to say that the assembly of the Conqueror and his immediate successor was a *Court* rather than an organized council, and that it was held, probably in continuation of the old English custom, thrice a year at the great Church festivals, alternately in the three cities of Westminster, Winchester, and Gloucester. Its members, properly so called, would be the old official classes of bishops and ealdormen or, as the Danes had taught Englishmen to style them, earls. But the earls had lost all but the barest connexion with the shires from which they drew their titles, and feudal influence had made them into an hereditary rank. Indeed, they soon take their place as the most important members of a larger class whose gradual definition has a far-reaching effect on the ultimate form of the English Constitution. The term *baro* was originally equivalent to *homo*, a meaning which survived in the titles of the Barons of the Exchequer and the Barons of the Cinque Ports. Under feudal influence it became limited to a feudal tenant, and thus to a tenant-in-chief. In its final stage it was the technical name for the holder of a certain number of knight's fees. Thus a distinction is generally made between the earls or chief barons, and by contrast the holders of one knight's fee from the crown or other tenants-in-chief. But Henry I's Charter² calls both classes equally *Barones*, and the Dialogus³ de Scaccario⁴ of Henry II's Treasurer, FitzNeal, definitely distinguishes the royal tenants into the two classes of *Greater and Lesser Barons* (*Majores seu Minores Barones*). It is all-important to notice that this distinction made itself apparent soon after the Conquest. Indeed Dr. Stubbs thinks 'it may fairly be conjectured that the landowners in Domesday who paid their relief to the Sheriff, those who held six manors or less, and those who paid their relief to the king, stood to each other in the relation of lesser and greater tenants-in-chief⁴'.

¹ *Hist. of Eng. Const.* i. 270 note.

² *Sel. Chart.* p. 100, § 2.
³ *Ibid.* p. 227.
Distinction between Majores and Minores Barones : *Const. Hist.* § 124 note, and above pp. 20-1.

But without committing ourselves to the exact dividing force of a possession of six manors, which seems to be based on two passages from Domesday, we may agree with Dr. Gneist that the extent of their possessions formed from the first the distinguishing mark between the two classes of tenants-in-chief¹. The distinction was clearer in more purely feudal matters. Dr. Gneist, remarking on the usual unit of the *constabularia*, or division of the feudal army, which on the continent consisted of fifty or at least twenty-five milites, believes that 'in England, in proportion to the smaller scale of enfeoffments, a smaller number appears to have formed the unit.' A recent writer (Mr. J. H. Round) has with much ingenuity placed it at five or ten knights². Here again, without laying stress upon the number, it will be sufficient to note that the greater barons were probably such as were responsible for the *supply of a troop of armed men to the feudal levy*; whereas the lesser barons were only concerned to account for their own appearance. And this seems borne out by the statement of the chronicler that scutage was only exacted from the *agrarii milites*³, who moreover, and probably in consequence, were included with the knightly sub-tenants in the liabilities of Henry II's Assize of Arms⁴. A distinction also seems to have been made from an early date in the practice of the Exchequer. Thus the *feudal dues* of the lesser tenants-in-chief were among the items for which the sheriff had to account; whereas the greater tenants in these matters were dealt with directly by the officers of the Exchequer. It was not, however, till the difference became legally fixed between the baron's and the knight's fee, and between the relief due from the former and the latter respectively, that this distinction can be said to have been established. Meanwhile, a new principle had been brought to bear which, equally vague and indeterminate at the first, gradually formed the basis of the later and more definite dividing line. This was the principle of *personal summons*⁵, of which in its application to the calling of the legislative body, though necessarily ancient in origin, no record exists earlier than the beginning of the thirteenth century⁶. Ten years later (1215) the Great Charter, expressing what must have been the usage for some time previously, ordains the individual summons to the body which grants the taxes, of

¹ *Hist. of Eng. Const.* i. 289.

² *Eng. Hist. Rev.* vol. vi, and below chap. ix. (1) in military service,

³ *Sel. Chart.* p. 129, A.D. 1159, Rob. de Monte.

⁴ *Ibid.* p. 154, § 1. (2) in payment of feudal dues,

(3) in method of summons.

⁵ *Ibid.* p. 210 et seq.

⁶ *Ibid.* p. 282.

Archbishops, Bishops, Abbots, Earls, and the Greater Barons. 'The *Majores Barones* are not defined; but the summons supplied the means of defining them, or rather it became a means of making them the only barons' (Mr. Freeman¹). For the present, however, the other tenants-in-chief, the *Minores Barones* of the *Dialogus*, were not shut out from the Council. They were to have a general summons through the sheriffs and royal bailiffs, on the analogy of the summons by which the sheriff gathered the lesser folk of the shire to meet the royal justices or officers of the forest. The full meaning of the distinction between these two classes of the barons was not for some time to become apparent. Meanwhile we have wandered sufficiently far from the legislative Council of the Norman kings.

The invertebrate and imitative Witan of the two Williams gives way to the more formulated COMMUNE CONCILIUM of the two Henries. Indeed, with the regulation of the administrative, which was so largely the work of Henry I's minister, Bishop Roger of Salisbury, the legislative body tended to grow in numbers and to be more inclusive. Even under the two previous sovereigns, occasionally and for a special purpose, the Witan had been swollen out into a general meeting of landowners. Such was the famous assembly at Salisbury in 1086, and such under Henry I were the meetings of 1107 and 1116. But all real business was still done by the magnates, whose powers, at any rate in theory, were considerable; although the absence of all record of opposition or independent action under the Conqueror and his sons points to the practically despotic exercise of the royal will. Indeed, this overshadowing power of the Crown explains the fact that all Councils summoned under the Norman kings sometimes seem to be called indiscriminately by the name of *Curia Regis*. Three kinds of such Councils may be roughly distinguished—(a) the administrative body of officials of the royal household, (b) the consultative or legislative body of the Witan or magnates, and (c) the larger and more rarely assembled body of landowners of all kinds. The explanation is to be found in the absence, or at least the rudimentary form, of all governmental organization throughout the period. As we have seen, William from the first established the

¹ *Essays*,
4th Ser.
p. 452.

The Curia
Regis of
the Nor-
man kings.

principle that no one had a right to advise the king except at the royal invitation. The constitution, therefore, of any particular body was due to the king's will and caprice. Thus all assemblies came together as royal courts, and to all and each the same name would suitably apply. Until Henry I no difference of function can be traced between administrative and legislative assemblies; while even under Henry I, when the organization of the administrative began, the financial side, known as the Exchequer, was the more formulated and prominent, so that there was no need for another name. Whatever was not the formulated *Scaccarium* still remained the *Curia Regis*. But the use of the name may be carried a stage further; indeed, it may be said to have gone through three phases, in each of which its meaning was narrowed down. In its earliest and freest sense it was applied to the legislative or deliberative body, which superseded the Witan. When, with the advance of organization in the early years of Henry II, the administrative and legislature were parting company, the name served to mark off the administrative on its newly formed judicial side from the deliberative body of the *Commune Concilium*. Finally, when in 1178, as already described, the king selected five out of his eighteen judges to remain in permanent session, the *Curia Regis in Banco*, as the Court came to be styled, gradually usurped the name hitherto given to the larger and more august assembly. 'It thus,' as Dr. Stubbs remarks, 'obtained stability and consistency, but was reduced to a lower rank¹.'

¹ *Const.*
Hist. § 163.

The *Commune Concilium*.

² Stubbs,
Const.
Hist. § 159.

§ 19. Meanwhile, under Henry II, a continued tendency towards an increase in size may be traced in the legislative assembly. The name *Commune Concilium* marks it off from the *Curia Regis*, and it altogether bears the aspect of a much more real institution than the analogous assembly of the Norman kings. But it was still far from being a settled engine of government. It is generally said² to alternate after 1154 between three forms: the ordinary, which consisted of the magnates; the extraordinary, an assembly of tenants-in-chief; and the theoretical form, which included the whole body of landowners in the kingdom. It will be seen that this was very similar to the usage of the Normans. But certain tendencies now became more strongly marked: for Henry II had

no fear of a complete Council of tenants-in-chief; but, not content with giving to the minor tenants of the Crown a more definite position than they had hitherto held, he went further and deliberately admitted the whole body of feudal sub-tenants. Instances of this last form of the assembly are possibly found in the gathering of the host for the siege of Bridgenorth in 1155, and in 1177 for an expedition to Normandy. In the latter instance especially, Henry is mentioned as acting by the advice of the assembled body¹. Such examples^{1 Sel. Chart. p. 131. Ben. Abb. i. 160.} seem to prove that Henry, like the Conqueror, desired to get rid of the claims of a feudal Council; but that, whereas William achieved it by lessening his body of advisers, Henry's aim seems to have been to swell it, until the tenants-in-chief should be swamped in a much larger and more inclusive body. The most frequent deliberative body of Henry and his sons seems to have been the orthodox Council of tenants-in-chief; and certainly it is this body which finds recognition in Magna Carta as the representative of the interests of the English people. The recognition, now for the first time legal, of a distinction in the mode of summons, no doubt was an important departure from ordinary feudal principles, in that it violated the theoretical equality of all the royal tenants; but it is to be noticed that even already, at the moment of the first expression of its legality, this system of summons was passing out of account. Two years before the signing of the Charter we find the first indications of the gathering of those elements which, rather more than a century later, were to form the House of Commons. In August, 1213, the king assembled through the sheriffs the reeve and four men from each township on the royal demesne to a Council at St. Alban's², for the^{2 Ibid. p. 276; Matt. Paris, p. 239.} purpose of assessing the amount of compensation which he owed to the bishops who at the papal bidding had excommunicated him, and whose goods had been confiscated for their pains. Three months later, at a Council called to Oxford, but of whose assembly there is no proof, the counties also through the sheriffs were for the first time summoned to send four discreet men to speak with the king concerning the business of the kingdom³. But these instances belong to the^{3 Ibid. p. 287.} history of the future. At present we must confine our attention to the period which preceded the Great Charter.

Powers of
the Com-
mune Con-
cilium :

(1) coun-
sel,

(2) legis-
lation,

The real advance in the part played by the legislative body under the early Plantagenets is to be found perhaps not so much in the extension of its form, which, as we have just seen, is probably overrated, as in the greater reality and frequency of its powers of action. This however must be cautiously expressed. Certainly the kings consulted their Council on nearly every point, whether it was a definite matter of home or foreign policy, or even the state of the kingdom in general. Nor was such (1) *consultation* necessarily a mere form. Normans and early Plantagenets were in a sense equally despotic, and the king would only submit such things as he chose to the consideration of the general Council. Thus there is an almost entire absence of any opposition to or remonstrance against the royal will. A few such cases are indeed recorded, but they seem to have been completely disregarded. Perhaps a more effectual influence over the king was found in the presence of the archbishop, and, especially in secular matters, that of the justiciar. At any rate, John writhed under the homilies of Geoffrey Fitz Peter, whom nevertheless he did not venture to dismiss.

With this knowledge of both the extent and the limitations of the royal authority, it will not be surprising to find that in legislation and taxation alike the theoretical power of the Council fell far short of that which it practically exercised; though in moments the practice strove to conform to the theory. Thus in (2) *legislation*, though much of it, whether in the form of Norman Charters or in that of Plantagenet Assizes, was really of the nature of edicts, declaratory and temporary both in form and force; yet even here the kings did not hesitate to claim the advice and assent of their Council. William I's Ordinance for the separation of the spiritual and temporal Courts is issued *communi concilio et consilio* of his clerical and lay advisers¹; while Henry I asserts that he keeps his forests at his father's boundaries with the common consent of his barons². Under the Plantagenets this assertion is even more constant. The Grand Assize is set on foot; the Assizes of Clarendon (1166), Northampton (1176), and Woodstock (1184), are all equally issued with the assent or at the advice of the great men of the kingdom. But the reality of all this reiterated assertion of baronial power may be measured by the single recorded instance of initiatory legislation. The

¹ *Sel. Chart.*
p. 85.

² *Ibid.*
p. 101, § 10.

Assize of Measures in 1197 was enacted by petition and advice of the bishops and barons. Thus, no doubt, much of this assent to legislation must have been merely formal; but Dr. Stubbs reminds us¹ that, if it had been more of a reality, it would, like much of the judicial power, have become a monopoly in the hands of the barons and their representatives; whereas the real exercise of the legislative power was not taken out of the hands of the king until the people and the barons were united in a common cause.

That some form of application in the matter of (3) *taxation* was observed by the Norman kings, seems probable both from Henry I's description of a certain aid as that 'which my barons gave me,' and from the engagement contained in the Order for the holding of the Courts of the Hundred and the Shire², that in the future he would summon the Courts when his royal needs required it, which may be interpreted as a concession on the part of the king to the necessity of popular consultation. The amount of meaning in these forms may be judged from the usual expression of the chroniclers with regard to Henry II and his sons, that the king *took* a tax. It is true that under John a slight change of form is to be observed. In 1200, John 'demanded' an aid from the whole kingdom³; in 1204, a scutage of two-and-a-half marks from each knight's fee is said to have been granted to the king⁴; in 1207 he came to an agreement with his bishops and abbots as to the amount of an ecclesiastical grant, but it is immediately added in the case of the laity that the king 'determined' that every one should give him a thirteenth part of their possessions⁵. This last, indeed, expresses John's real attitude in the matter, and the more constitutional expressions must probably 'be interpreted of the mere payment of the money⁶.' Here at all events there is opposition to the Crown, but it is based throughout on the feudal idea of a voluntary aid from the tenant to relieve the lord's necessities. Thus in 1156, Archbishop Theobald's denunciation of scutage probably resulted merely in the omission of his lands from the levy. In 1163, Archbishop Thomas Becket declared that *his* lands would not contribute to the Danegeld⁷. The result of this individual opposition was that important questions were not fought upon their merits, and their solution was thereby

¹ *Const. Hist.* § 160.

² *Sel. Chart.* p. 104.

³ *Ibid.*

p. 272.

Rad.

Cogges

⁴ *Ibid.*

p. 273.

Matt. Par.

p. 209.

⁵ *Ibid.*

p. 273.

Ann.

Waverl.

⁶ Stubbs,

Const.

Hist. § 161.

⁷ *Sel. Chart.*

p. 129, V.S.

Thomae.

delayed. The objection was based upon quibbling grounds—the rights of a class, as when Bishop Hugh of Lincoln, in 1198, refused his assent to a grant for the maintenance of 300 knights, on the plea that the lands of *his* church were bound to render military service in England alone¹—or the promise of the individual, as when Archbishop Geoffrey of York, in 1201, and again in 1207, resisted the levy of a carucage on the plea that *he* had not promised it. A more hopeful sign of advance in the future is the occasional remonstrance of a class. Thus, in 1194, the Canons of York refused the fourth part of their moveables for King Richard's ransom; while in the instance just mentioned of Archbishop Geoffrey's resistance to a carucage in 1207, he was the mouthpiece of the whole body of prelates. This indication of a real change of attitude was doubtless due to the spread of the incidence of taxation from land to moveable goods, from real to personal property, and it brings in its train the idea that taxation and representation go hand in hand. But the legal definition lagged here, as usual, behind the actual fact; for the twelfth article of Magna Carta makes no provision for the levy of a tax on moveables by consent of those who are called on to pay. This consummation, however, was reached at no very distant date.

¹ *Set. Chart.*
p. 256.
V. M. S.
Hugonis.

The last power of the Commune Concilium to be noticed is its function as a (4) *Court of Justice*. Of this there are frequent instances throughout the reigns of the three first Norman kings, when there was practically no distinction between the administrative and deliberative organs of government. It was 'the full national assembly and not the mere justices' before whom these cases were conducted; it was the barons, proceres or magnates, who acted as the judges. With the separation of the Curia Regis and the Commune Concilium, the former seems to have absorbed the judicial authority; nor did the latter obtain its position as a Court of Justice, until the partial fusion of the administrative and legislature, which was characteristic of the reign of Henry III.

Origin of
Parliament,
1215-1295.

§ 20. With the signing of the Great Charter opens the chief transitional period in the history of the English Legislature. It is necessary to deal with the constitutional history of the next eighty years more chronologically, and at times in greater detail. The preceding account of the Commune Concilium

before 1215 should have clearly brought out two important points—*first*, the early and growing separation which reached its culminating point in Magna Carta, of the tenants-in-chief into two distinct classes; and *further*, the occasional inclusion by both Norman and Angevin sovereigns of others than tenants-in-chief in the National Council. At the same time it must be borne in mind with reference to the Charter itself, that, while its real importance lay in the fact that it was the outcome of the first national movement in English history, *the provision made in it for the maintenance of national rights was one based on merely feudal considerations.* The results of this were most important on the future development of the national assembly. For, in the first place, while the king, or rather the regents under Henry III, no longer summoned any other than feudal tenants to the Commune Concilium, the (a) minor tenants-in-chief availed themselves of the general summons to which alone they were henceforth constitutionally entitled, to shirk attendance altogether. At the same time the king, in his desire to avenge himself for that desertion of his official barons which had forced him to the signature of the Charter, surrounded himself with a body of foreign kinsmen and dependents who owed their advance entirely to his favour. The most selfish instincts of the *Majores Barones* were immediately called into play, and their objects were narrowed down to the simple endeavour to get rid of the foreigners, who were filling the positions which the barons regarded as the monopoly of their class. Thus (b) all the early schemes of constitutional reform were oligarchical in character. The king was gradually driven to a larger policy. On the enforced banishment of the foreigners he turned for help to the lesser barons and the Shire Courts, indignant equally with himself, though for very different reasons, at the oligarchical character of the government. A very short experience, however, showed them that Henry was using his new friends merely to recover his own lost power, which would be exercised in the recall of his old allies and foreign friends. This it was which finally provoked the more statesmanlike among the greater barons to put themselves at the head of a national movement, which ended in the substitution of a national organization for one framed on a purely feudal model.

Results of
the Great
Charter.

Prepara-
tion for
Parlia-
ment.

Thus the time which lies between the passing of the Charter and the completion of a national organization which has preserved its main features down to the present day, may be divided into four fairly distinct periods. During the first of these (1215-1237) the general interest centres in the struggles with the foreigners; and the constitutional advance, though interesting and noteworthy, lies below the surface. The second period (1238-1265) contains the schemes of baronial reform, ending in Simon de Montfort's celebrated contribution to the system of national organization. To this succeed thirty years (1265-1295) during the greater part of which a series of royal experiments in what may be called schemes of national reform, culminates in the determination of the elements of which all future Parliaments should be composed. Then for the next forty years (1295-1334) the various classes were trying their strength against each other, with the result that they formed themselves into the two modern Houses of Lords and Commons.

1215-1237.

Divorce of
minores
barones
from
Commune
Concilium.

The constitutional interest of the first period lies in two directions. In the *first* place, there must be noted the *growing separation between the greater and lesser tenants-in-chief*. This was immediately due to the provision of Magna Carta to which frequent allusion has been already made, and to the natural burden of attendance, which would weigh all the more heavily on the smaller tenants, now that they found their presence regarded as constitutionally almost superfluous. Their desire to shirk attendance was only enhanced by the selfish policy of the greater barons, who were set still further apart from their feudal peers by the exemptions granted them during Henry III's reign from ordinary attendance at the local Courts. *Meanwhile*, much was happening to draw the energies of the lesser barons in another and more fruitful direction. It has been pointed out, in speaking of the land tenure, that with the lapse of time the status of the holder did not become of so much importance as the performance of services from the land¹. Thus many tenants-in-chief, in the acquisition of new estates, became by process of subinfeudation sub-tenants holding of mesne lords, i. e. those who were themselves tenants of a lord. At the same time alienations, mortgages, and other complications to which the Crusades had given rise, had so split up

¹ p. 23.

the old estates and altered their boundaries, that grades of rank, at least among the smaller feudal tenants, had largely disappeared. When, therefore, the increased activity of the Shire Courts which marked the early years of Henry III's reign, threw together the smaller tenants-in-chief and the knightly tenants of the greater barons, the two found no difficulty in concerted action. Their interests were chiefly local in opposition to the purely class interests of the greater barons; and, as far as extent of possessions was concerned, many a feudal sub-tenant would be a larger landholder than the small country gentry whose boast it might be that no one interposed himself between them and the Crown. It need not, however, be supposed that the lesser tenants-in-chief resigned without a struggle their exclusive position in the feudal hierarchy. But the Crown itself, in its anxiety to diminish the importance and thereby the claims of feudal tenure, paved the way through scutage and distrain of knighthood for their political degradation. Here, however, and for the immediate purpose, it is sufficient to notice that the same causes which separated them off from the greater barons, would tend to draw them closer to the feudal sub-tenants and freeholders who formed the majority of the Shire Court.

Nor is it without significance, in tracing the growth towards the Parliament of Estates, that this great increase in the activity of the Shire Court was due to the *frequent occupation of the local bodies with matters of taxation*. Magna Carta had mentioned the grant of taxes as the only business of the feudal assembly which it appointed or rather recognized. But the assessment and collection of the grants were the business of the Shire Courts; and the knights appointed for these purposes were habitually *fewer in number* than those who were called into co-operation with the royal officials for judicial business. Thus, in 1220, two knights were to be elected in each shire to collect a carucage¹; in 1225, four knights from each hundred should assess and collect a fifteenth on personal property²; in 1232, knights of no specified number assist in the assessment of a fortieth³; in 1237, four knights, for whose appointment no provision is made, take a share in receiving assessments towards a thirtieth from a representative body of each township⁴. This restriction of number in the persons

Activity of
minores
barones
in local
govern-
ment.

¹ *Sel. Chart.*
p. 352.

² *Ibid.*

p. 335.

³ *Ibid.*

p. 361.

⁴ *Ibid.*

p. 367.

locally employed doubtless both suggested the idea of collecting local representatives into one body if their assent was required, and rendered it so possible of fulfilment that it is not astonishing to find that, when a new central *representative* assembly was called in 1254, its object was the assent to a grant of money. But this introduces a wholly new idea; so that it may be well, before passing on to the period which definitely gave it birth, to dwell for a few moments on the early history of the representative idea.

Union of
representa-
tion and
election.

The principle of representation was familiar to the early English moots. Election, too, which is now regarded as its invariable concomitant, was also known to them, but was not necessarily associated with the representative idea. Thus Tacitus describes elected *principes* as administering justice in the divisions of the German tribes¹. In the early English constitutional system the higher local courts contained representative elements from the lower; though these were not

¹*Sel. Chart.*
p. 57.
Germ. c. 12.

elected, except possibly in an informal manner in the townships. After the Norman Conquest, the feudal theory, which had been foreshadowed in English police arrangements of responsibility, regarded the lord as representing his vassals; and it is on this supposition alone that an explanation can be given of the curious expression in the writ for the collection of the thirtieth already noticed (1237), that the lords made the

²*Sel. Chart.* grant 'on behalf of themselves and their villans².' It is, however, in the jury system that the combination may be gradu-
p. 366.

ally traced between the two ideas of representation and election. The first step in this direction was taken by the Conqueror and his successor in their use of (1) the system of local representatives to gather information. Henry II extended the system to (2) ascertain the rights and liabilities, judicial and financial, of his subjects, through the co-operation of the local courts: while under Richard I these representatives (3) were elected and not merely nominated, as seems to have been the practice in his father's days. Instances of the whole process will be found in a detailed description of the growth of the

³ Chap. vii. jury system³. It will be sufficient here to recall the fact noted a few pages back, that John in 1213 was the first to (4) summon a representative assembly. The effect of this example was not reassuring. Already, in 1207, John had himself violated

the practice of his father and his brother by making no use of a representative local body for the assessment of the thirteenth exacted in that year¹. Magna Carta took no notice of the ¹*Sel. Chart.* representative principle in its provisions for the grant of taxation, though it extended the system of election from the Grand Jury to the juries used in the three assizes of *novel disseisin*, *mort d'ancestor*, and *darrein presentment*², a conces- ² *Ibid.* sion which seems to have been withdrawn in the second ^{p. 299,} re-issue of the Charter early in the following reign³. But these ^{§ 18.} lapses from the principle of representation were only momentary. Recognition had been gained of the three ideas which ³ *Ibid.* culminated in the modern Parliament, namely, Representation, ^{p. 345,} Election, and Concentration in a central assembly. Stress of ^{§ 13.} circumstances in the ensuing period caused the gradual and complete establishment of these three elements in the modern system of representative government.

With 1238 begin the *schemes of baronial reform*. For the ^{1238-1265.} ensuing twenty years these schemes may be said to be characterized by three features, or more correctly, the baronial ^{Attempted} demands took three forms. Following the example of earlier ^{reforms} occasions (1218, 1223, 1224) the barons sought from the king ^{of majores} or his ministers (i) a *reconfirmation of the Charters* in return ^{barones.} for a grant of money. Thus in 1253 this was done with such solemnity that a sentence of excommunication was issued against all transgressors⁴; while in 1254 the demand, coupled ⁴ *Ibid.* with the refusal of the bishops and barons to be responsible ^{p. 373.} for the willingness of the smaller folk to contribute, caused the Queen and Earl Richard of Cornwall, regents during the king's absence in Gascony, to repeat the abortive experiment of 1213. The sheriffs were directed to send up to a Council at Westminster two knights chosen by the county, who should declare the amount of the aid which their electors were willing to grant⁵. A more questionable demand was for (ii) the *election* ⁵ *Ibid.* of *ministers* by the Commune Concilium. But this it was ^{p. 376.} scarcely likely that the king would grant, and certainly not advisable that the barons should enjoy. The demand, however, was not made altogether in vain. In 1237 the barons rejected the indirect hold over the government which would have followed the control of public expenditure offered to them by Henry's minister, William of Raleigh. They either regarded it as an

indirect attempt to raise money more regularly, or were too stupid to be contented with anything short of a definite placing of the Crown in commission. The immediate effect seems to have been that the Crown was ready to accede to their utmost desire; for in 1238 Henry was only prevented by the refusal of his brother Richard from agreeing to abide by the decisions of chosen ministers for general reforms. In 1244 the prelates and barons nominated a committee of twelve to place their demands before the king, chief among which was one for the appointment of ministers. As the struggle grew intense this demand became more frequent (1248, 1249, 1255), and not satisfied with an attempt to monopolize the central administration, the barons aimed at securing the appointment of the sheriffs, through whom the king was able to make his influence penetrate into distant parts of the country. The most significant and practical demand of the barons during these twenty years was for (iii) the *regular summons* to a 'Parliament.' The word itself seems to have been introduced in the course of the struggle, and the chronicler, Matthew Paris, is accredited with its first use in 1246, for a general assembly of the legislative body¹. The feeling seems to have been growing, that piecemeal representation of the nation in casual assemblies convoked only at the pleasure of the king, was probably accountable for the weakness of the opposition to the Crown. The expression of this feeling at first took the form of refusal to act from want of complete powers. Thus in 1253 the clergy used the absence of the Archbishops as an excuse for not deciding in an awkward matter. Already in 1249, and again in 1255, the barons for analogous reasons assumed a similar passive attitude.

¹ *Sel. Chart.*
p. 328;
Matt.
Paris,
p. 696.

Provisions
of Oxford.

Yet it was very slowly that the barons found their way to the right solution, despite the example of the regents in 1254. For when, in 1258, the king was compelled by the difficulties arising out of his promises to the Pope, to put himself into the hands of the barons, there was no thought of the extension so as to include a wider range of persons, of that oligarchical body which had already proved its incompetence to grapple with questions of government. At the first Parliament in that year, a committee of twenty-four, chosen equally from the Royal Council and the barons, drew up an elaborate *scheme of*

provisional government, which came into existence at a second meeting held at Oxford in June of the same year, and known to subsequent ages as the Mad Parliament. Here a list of grievances was presented by the barons¹, and the scheme called the Provisions of Oxford² was ratified. By this, no less than four committees were appointed, one of which, however, was merely to treat of a temporary money grant. Of the other three, the first was a committee of twenty-four chosen from either side by an elaborate process of double election, whose work should be the appointment of great officers of state, and the redress of grievances. A standing Council of fifteen was further appointed for the king; and finally, in order to lessen the troublesome duty of attendance in Parliament, a third committee of twelve was appointed who should meet the Council of fifteen thrice a year as representatives of the nation. It is not necessary to criticize the scheme at length. It would be hypercritical to note that the powers of the two permanent committees were not accurately defined, and that no provision was made for the filling of vacancies or for the cessation of the scheme. It is sufficient to point out that, while professing to leave to the king his authority constitutionally restrained, and pretending to represent the nation at large, in reality the scheme placed the executive in the hands of an oligarchy of barons in whose quarrels there was no mediating authority. It was to the interest of no one except the members of the several committees, that such a method of government should be retained; and it was not long before their mutual jealousies brought it to an end.

Meanwhile, we must look in another direction for the solution of the problem. It was perhaps the action of the regents in summoning representatives from the Shire Courts in 1254, that emboldened a body, calling itself the *Communitas Bachelerie Angliae*, i. e. the knights who found themselves by the action of the barons definitely shut out from the Commune Concilium, to address a remonstrance to Prince Edward in October, 1259³. This had an immediate result in the Provisions of Westminster⁴, by which remedies were promised for most of the complaints mentioned in the petition of the previous year. Far more important is the fact that it was probably the initiative taken by the knights in this matter which, on the renewal of

¹*Sel. Chart.*

pp. 382-7.

²*Ibid.*

pp. 387-396.

Simon de Montfort's scheme of government.

³*Ibid.*

p. 332.

Ann.

Burton.

⁴*Ibid.*

p. 400-5.

- the quarrel in 1261, suggested to the barons the advisability of summoning three knights from each shire south of the Trent to the autumn Parliament at St. Albans. The king made a similar bid for popular support by summoning the same three to Windsor¹; but there is no record that either Council was ever held. Three years later Simon de Montfort had won the battle of Lewes, and had taken the burden of government upon his shoulders. In June, 1264, he called together his first Parliament, to which, acting on the precedent of 1254, he had summoned four elected knights as representatives of each shire². They were not, however, given a voice in the formation of the *scheme of government* which followed. This was a matter for the initiated alone. Three electors were, according to one reading, to be chosen by the barons; according to another explanation, self-appointed. These should receive authority from the king to choose nine councillors, of whom three should in turn be always at the Court. All business of State should be done by their advice, and disputes decided by a two-thirds majority of either Council or the three electors; and finally, provision was made for the filling up or the removal of members of the Council³. The exact effect of this constitution is a matter of considerable dispute. All writers compare it with the elaborate committees of 1258. On the one side Dr. Pearson⁴ and M. Bémont regard its tendency as more oligarchical than that of the arrangements of six years before. 'The constitution of 1258,' says M. Bémont, 'gave all the power to Parliament (i. e. the representatives of the baronial party); that of 1264 placed all the authority in the hands of three electors⁵.' As against this view, Dr. Stubbs and Mr. Prothero maintain that Simon's provision is a distinct development of the scheme of 1258. 'The provisions of 1258 restricted,' says the former, 'the constitution of 1264 extended the limits of Parliament⁶.' Mr. Prothero even holds that the three electors resembled the modern Prime Minister, for that, once elected, they were dependent on the will of the *Communitas*, in which were included the knights of the shire⁷.
- In January, 1265, Simon gathered his second Parliament. It was here that the great constitutional advance was made with which his name is especially connected; for to this

¹ *Sel. Chart.*
p. 405.

² *Ibid.*
p. 412.

³ *Ibid.*
p. 413.

⁴ *Hist. of Eng.* ii.
252.

⁵ *S. de Montfort*,
p. 217.

⁶ *Const. Hist.* § 177.

⁷ *S. de Montfort*,
pp. 289-293.

assembly were called not only two knights from each shire, but also, practically for the first time, two citizens or burgesses from twenty-one cities or boroughs mentioned individually by name¹. It is for this reason that *Simon de Montfort has been called the creator of the House of Commons*. He is, however, scarcely entitled to the name. For, in the *first* place, a very cursory glance at the members summoned will show that the assembly was merely a parliamentary representation of Simon's own supporters. Thus, of the barons, who as a body were unfavourable to his cause, only five earls and eighteen barons were summoned; while of the clergy, who were his staunch supporters, there was a very full and disproportionate number. *Again*, with regard to Simon's own particular contribution to the making of the national assembly, the representation of the towns was avowedly due to their support of Simon; and the writ for election was addressed to the mayor of an individual specified town, not to the sheriff for a general representation of all worthy towns in his shire. And, *further*, Simon's merit as a great constitution-maker disappears altogether in the serious doubt whether this Parliament of representatives was intended to be permanent. Indeed, M. Bémont is of opinion that its only object was to sanction the scheme of government established in the previous year, and he points out that, in the writs of summons for the following June, only prelates and greater barons are summoned and there is no mention of the commons². Thus, while denying to Simon de Montfort the proud title of 'creator of the House of Commons,' we need not minimize his work by suggesting with Pauli³ or Hallam⁴ that he borrowed his ideas from Aragon, or with Milman⁵ that he was indebted to Frederick II's Sicilian Constitution, or with a later writer⁶ that he made use of his experience in Gascony. However far we are prepared to go in opposition to his claims, we may at least believe that his real merit lay in the fact that he was the clever adapter of existing materials; and, even more important, that although a foreigner, he worked from thoroughly English bases.

The ensuing thirty years may, from their leading feature, be styled the period of *attempts at a gradual formation of a National Council*. Certainly the death of Simon at Evesham was followed by a pause: for the rest of Henry III's reign nothing

Simon de
Montfort's
Parlia-
ment.

¹ *Sel. Chart.*
p. 415.

² *S. de
Montfort,*
p. 231.

³ *Ibid.*
p. 180.

⁴ *Mid.*
Ages, ii. 43.

⁵ *Lat.*
Christ. Bk.
x. ch. 3.

⁶ *Anti-*
quary,
June and
Aug. 1883.
1265-1295.

Edward I's experiments. was done in the direction which the example of the great leader seemed to have indicated. But his work had not gone by unheeded, and fortunately it was left for a king who was also a statesman to accomplish it. In 1273, even before Edward's return from Palestine, his regents summoned to a convention for taking the oath of allegiance not only the prelates and barons, but also four knights from each shire and four citizens from

¹*Sel. Chart.*
p. 429.
Ann.
Winton,
p. 113.

each city¹. This may have been to ensure the support of the entire nation, doubly important in the prolonged absence of an uncrowned king; but whatever the reason, the imitation and elaboration of the assembly harmonized entirely with Edward's own designs. Of this first Parliament, which met in April, 1275, no writs of summons are extant: but the preamble to its most important enactment describes it as made, not only by the usual classes of the barons, but also by 'the community of the realm thither summoned².' Dr. Stubbs thinks from this mode of expression it is 'almost certain that some representatives of the commons must have been present³.' For the next twenty years Edward seems to be conducting a series of experiments with the object of determining in what proportions the various classes, which the events of the last reign had stereotyped, would most suitably combine. Thus, to deal in detail with the most prominent instances, in 1283 he called two representative bodies. In January, acting on the analogy of the clerical convocation, he called two provincial Councils at York and Northampton respectively. The magnates were absent with the king in Wales, and the Councils consisted solely of four knights from each shire and two representatives from each city, borough and 'villa mercatoria' summoned through the sheriff⁴. To these were added members of the clergy; for the archbishops were directed to summon through the bishops the heads of the various religious houses and proctors of the cathedral clergy⁵. Judged by the later standard these Councils were imperfect bodies; for, besides the absence of the barons, there were no representatives of the parochial clergy, and most important of all in the prospect of future imitation was the fact that it was not one national assembly. Later in the same year (September, 1283) was called one body known as the Parliament of Shrewsbury or of Acton Burnell, to which besides the barons there came two knights for each shire, and

² *Ibid.*
p. 450.

³ *Ibid.*
p. 449.

⁴ *Ibid.*
p. 465.

⁵ *Ibid.*
p. 466.

two representatives from each of twenty-one cities and boroughs specified by name and summoned therefore not through the sheriff, but by writs addressed to their own mayors or bailiffs. The two meetings of January had been called to make a grant. This assembly was brought together chiefly to give national sanction to the condemnation of the Welsh Prince David. Consequently the clergy were entirely left out, and such legislation as there was seems to have been submitted to the baronage alone¹. In 1290, after the barons had passed the¹ *Sel. Chart.* important statute *Quia Emptores*, they were reinforced by two^{PP. 467-8.} or three knights from each shire for the purpose of a money grant; but no representatives were called of the towns or the lower clergy². In 1294 the parliamentary representation of the² *Ibid.* clergy was completed; for in September of that year the clergy^{PP. 477-8.} were summoned, though separately, yet to one assembly embracing representatives from both provinces. Thus, besides the bishops and a large number of abbots, there came deans of cathedrals and archdeacons in person, and of cathedral chapters one, and of the parochial clergy two, proctors from each diocese summoned through the bishops. The importance of this assembly lies in the acknowledgment which it carried with it of the need of clerical consent by representatives to taxation³. In October of the same year came another³ *Ibid.* maimed lay assembly, the magnates and four knights from^{P. 480.} each shire⁴; but in 1295 for the first time all these various⁴ *Ibid.* ingredients were added together in their completest form to^{P. 481.} make what has been known to after ages as the *Model Parliament*. To this assembly came the archbishops and bishops, three heads of religious orders, sixty-seven abbots, seven earls, forty-one barons, two knights from each of thirty-seven shires, and representatives from each of 110 cities and boroughs throughout⁵ *Ibid.* the kingdom, a body of rather more than 400 persons⁵.^{PP. 484-7.}

But although it may be true that, starting from this date,^{1295-1334.} 'a perfect representation of the three Estates was secured, and a Parliament constituted on the model of which every succeeding assembly bearing that name was formed' (Dr. Stubbs⁶),⁶ *Sel. Chart.* it was nearly forty years before the form was really complete.^{P. 483.} Mr. Freeman has shown how purely accidental was the formation of the English Parliament into two chambers rather than^{Change of Estates into Houses.} into three or four. Edward I had in his mind an assembly of

three Estates, which seems to have been the common form of which variations are found in the development towards self-government of nearly every European nation. 'An assembly of Estates,' says Dr. Stubbs, 'is an organized collection, made by representation or otherwise, of the several orders, states or conditions of men, who are recognized as possessing political power'.¹ But in England the three theoretical Estates of clergy, lords and commons never had a chance of combination. The lower clergy persisted in their attitude of aloofness; the knights hovered between the barons and the burgesses. It took forty years for those interested to discover that the clergy could well be left to their own devices, and that the real interest of the knights lay in union rather with the burgesses than with the barons. At first the various Estates—barons, knights, burgesses and lower clergy—when they came, sat each by itself, probably in different parts of Westminster Hall and voted its money separately and in different proportions. But the terms of the grant were of most importance to the represented and the poorer Estates, who moreover had been called to Parliament solely for that purpose. It is not wonderful, then, that they soon monopolized the privilege, if not the sole right, of settling the amount of money grants, and the lords acquiesced in their exercise of this power, as the king did in the abstention of the clergy, because they perceived it was to their own advantage. That the separation of the Estates into the two bodies of lords and commons is not unconnected with the acquisition of the monopoly in taxation by the latter, would appear from the fact that, although Hallam is inclined to date such separation as early as 1315², the first distinct record of a separate session is not found till 1332, while two years later the various proportional grants of the different Estates, which had settled into an uniform rate of one-fifteenth and one-tenth, became a fixed sum of close upon £40,000³.

¹ *Const. Hist.* § 185.

² *Med. Ages*, iii. 38.

✓ Chap. x.

Growth of Commune Concilium into House of Lords.

§ 21. But for the present we must follow the fortunes of the members of the old Commune Concilium. The organization of this body on a feudal model had, as we have seen, been sanctioned by Magna Carta for purposes of taxation. But this was the very duty for which Edward I had formed a Parliament of the three Estates. Meanwhile, the Commune Concilium, despite the limitations of the Charter, had acquired

a voice in the regulation of every department of government ; for the minority of Henry III had thrown the whole supervision of the administration into its hands, while the most prominent barons would necessarily be members of the administrative Council, and the two Concilia, both Commune and Ordinarium, might be fused, if not confused together, as had been the Curia Regis and Commune Concilium itself before the defining work of Henry II. The magnates then, like the clergy, had a corporate existence in a recognized assembly with more or less definite rights before Edward I placed at their side, and bade them share the most important of their powers with, the representatives of the commons. And not only was it unlikely that they would surrender this position without a struggle ; but in the end, although they had to share with the commons the powers of legislation and general deliberation as well as the first won power of taxation, their descendant—the House of Lords, retains to this day the power of a Court of Justice, which it has never shared with the Commons, but which has descended to it from the days before Edward called the latter to the National Council. The immediate point, then, is the *gradual transformation of the Commune Concilium into the HOUSE OF LORDS*. It will then be necessary in another chapter to trace the gradual growth of the powers of the House of Commons until the old constituents of the Commune Concilium had become the ‘Other House,’ or, to use the phraseology of modern political science, a Second Chamber. It may shortly be premised that the distinction between the Commune Concilium and the House of Lords is to be found in the gradual growth and ultimate, if not entirely complete, triumph of the hereditary over the original principle of official wisdom. The early bishops and earls traced their rights to be present in the National Assembly to a time before writs of summons were in use ; in other words, their right was immemorial, and to them alone at the introduction of special summonses the writ could not be refused. But the earls soon became hereditary, and with the introduction of the greater barons as a separate class, the hereditary character of the members tended to increase, and with it and by its means the Commune Concilium was transformed into the House of Lords.

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Qualifications of lay members.

The first point, then, that calls for notice is the means by which this hereditary character of the lay members of the House of Lords was gradually established. It has already been shown that at the Norman Conquest the qualification of tenure-in-chief had been added to that of official wisdom in the formation of the Witan or National Assembly. It will also be remembered that an early distinction arose between the greater and the lesser tenants of the Crown, which may have been due primarily to William's policy of selection, and was certainly emphasized by the particular medium used for his selection, namely the employment of writs of summons. Now, so long as the advisers of the Crown remained in the strictest sense the *Curia Regis*, no question would arise and no arguments could be drawn from the reception of these writs; but with the formation of the Commune Concilium it would be of importance to determine who were entitled to expect the summons. It was the already established customary distinction between the *majores* and *minores barones* which enabled the king to set aside a claim founded on and coextensive with mere tenancy-in-chief. The *majores barones*, then, were the persons so privileged; but who were they? The kings perhaps purposely never attempted to determine. They were not the tenants-in-chief as such; they were not even the holders of a legal barony, 'the mere acquisition of thirteen knights' fees and a third did not make the purchaser a baron' (Dr. Stubbs¹): for under Edward I there is proof of the existence of many such barones who found no place in his Parliament. No doubt the bishops and earls could not well be omitted from any gathering of the Council; but everything goes to show that the king exercised a wide choice in the selection of those who should be enumerated among the *majores barones*. Indeed, for military service a much larger number of persons came under that designation than for Parliament: Henry III is said to have reckoned as many as 200 holders of technical baronies, to all of whom a special summons might be sent. *Tenure by barony then, as such, never conferred a right to a writ of summons; even if it was ever an antecedent condition of the reception of a writ, this early ceased to be the case.*

(1) Tenure by barony.

¹ *Const. Hist.* § 189.

But before passing on to consider the effect of writs of summons in determining the members of the House of Lords, it is

most important to notice *the lasting influence of rights and claims arising from the idea of tenure*. Until a general decision of the House of Lords in 1640. it seems to have been possible, if not to sell a barony and with it a right to the reception of a writ, at least to *limit the method of descent to a particular branch*. Such at any rate was the effect of the settlement by William Baron Berkeley of his lands upon King Henry VII to the exclusion of his own immediate descendants. On the failure of Henry's heirs male in Edward VI the barony returned to the great grand-nephew of William, and with it the summons to Parliament which, being vested in the Crown, had been in abeyance since the death of Lord William. The same resolution of the House of Lords forbade the *surrender of a barony to the Crown*¹, and in 1678 this was clenched by a decision in a particular case that no peer could surrender his rights to the Crown or divest himself of his barony by what seems hitherto to have been the method of accomplishing it, the process of suffering a fine. The only possible foundation for these practices of transference and surrender is to be found in the continuance of the idea of barony by tenure. To the same influence must be attributed the power which the heiress of a barony possessed, of *conveying to her husband, although a commoner, a right to the reception of a summons*². And 'although some royal act of summons, or creation, or both, was necessary to complete the status, the usage was not materially boken down until the system of creation with limitation to heirs male was established.' Indeed, until a contrary decision in 1580, it was even held that a *tenant by the curtesy of England*, as this right was styled, could retain his seat after his wife's death, and consequently to the exclusion of his eldest son.

Permanent effects of claims from tenure.

¹ *Complete Peerage*, by G. E. C. i. 293-4.

² *Ibid.* i. 392-3.

But it is only within recent memory that the parliamentary claims of barony by tenure have been definitely rejected. It was not altogether unknown as the basis of a claim to sit in the House of Lords; but it seems to have been allowed as valid in the case of the earldom of Arundel alone, though it was also certainly implied in the descent of the Berkeley peerage mentioned above. The early opinions on the question were of doubtful meaning, based on expediency and not on law. Thus an Order in Council of 1669 definitely took this

Their late survival.

standpoint: even the judges who were consulted on the case of the barony of Fitzwalter (1669) thought that baronies by tenure 'were not fit to be revived,' because they 'had been discontinued many years.' The conclusions of the Lords' Committee on the Dignity of a Peer early in this century were a mere re-echo of this opinion: it was only 'change of circumstances' which had abrogated 'the right of any person to claim to be a lord of Parliament by reason of tenure'.¹ The matter was finally settled by the judgment of the House of Lords in the case of the Berkeley peerage in 1861, in which claims resting on two striking instances of a devolution of the title were peremptorily disallowed. There is no need to exaggerate the importance of this decision; but it may be pointed out that an extensive allowance of this claim, coupled as it must be with the freedom of alienation characteristic of the modern land laws, would enable a subject to transfer the peerage to a stranger, and to 'compel the unwilling sovereign to receive the homage of a peer so created'.²

¹ *Report*,
ii. 241.

² Lord
Campbell,
quoted by
Anson,
i. 196.

(2) Receipt
of Special
Summons.

³ *Const.*
Hist. § 189.

There is, then, no need to underrate or to ignore the influence of baronies by tenure. At the same time, the solution of the question of the general advance towards an hereditary peerage must be sought in other directions. It has been seen that practically it was the *reception of a special writ of summons* from the king which placed a tenant-in-chief among the *majores barones*; so that in this sense alone it can be truly said that 'that estate was a barony which entitled its owner to such special summons' (Dr. Stubbs³). But though the king could and, as we have seen, did exercise a very wide discretion in the bestowal of the writ, there would be a certain number of barons, such as the earls, from whom it could not well be withheld, and a certain number of great barons just below that rank, in whose minds one reception of the summons would easily raise presumption of another. As a matter of fact, it seems that under Henry III the king's use of the writs did cause dissatisfaction; for in 1255 the magnates refused to grant an aid, since all of their number had not been summoned in accordance with the direction of the Charter. It may be, then, that Edward I was not so great an innovator as is commonly supposed. Dr. Stubbs regards the year 1295—the date of the 'Model Parliament'—as the point of time

from which the regularity of the baronial summons is held to involve the creation of an hereditary dignity, and so to distinguish the ancient qualification of barony by tenure from that of barony by writ¹. Mr. Freeman rightly seems to consider this as too absolute a statement, though he is willing 'to fix the reign of Edward I as the time when the hereditary parliamentary baronage began, without rigidly ruling that the king could not after 1295 lawfully refuse a summons to a man who had been summoned already².' What Edward I seems to have actually done was to select a small number who should constantly receive the special summons, and thus, as Dr. Stubbs points out, by implication to have put an end to tenure as the sole qualification for reception of a writ. But Edward probably took a further and more important step in the entire divorce of tenure and summons. There is considerable evidence to show that out of even the diminished numbers whom he called to Parliament, some owed their seats solely to the reception of a special writ apart from all possible qualification of baronial tenure. Thus Thomas Furnival, who was proved in 1326 not to hold his lands on baronial tenure, was nevertheless summoned by special writ from 1295 to 1332. It is because of these innovations that *Edward I has been called the creator of the House of Lords*, as much as he is generally acknowledged to be the creator of the House of Commons. As a matter of fact both titles are misleading. In Mr. Freeman's clear words, 'he did not create the first elements of either, which existed long before, nor did he give either its final shape, which neither took till afterwards; but he established both in such a shape that all later changes may be fairly looked on as merely changes in detail³.' It was the settlement of the hereditary, or as⁴ *Ibid.* Mr. Freeman would have us call it, successive character of the writs of summons, that brought to the front the question of the nature of this hereditary succession. A place in the House of Lords being hereditary, i. e. passing to a successor, who, on the death of the present recipient, was entitled to the writ? We have seen that in some few cases the claim of the holder of a barony was allowed, which he had acquired by alienation and not by inheritance. But a statute of 1382, which, however, has been supposed to be merely declaratory

¹ *Const. Hist.* § 428.

² *Essays*, 4th Ser. p. 454.

³ *Ibid.* pp. 455-6.

¹ *Law and Custom of Const.* i. 186.

² *Ibid.* i. 193.

(3) Letters patent.

of the existing custom, practically determined that 'a writ of summons conferred a right to be summoned upon the heirs of the first recipient of the writ if only he had obeyed it and taken his seat' (Sir W. Anson¹). This has been confirmed by two decisions of the House of Lords in the reign of Charles II, connected with the names of Clifton (1673) and Freschville (1677). But the statute did not determine who were the heirs. In discussions of the question, when it has arisen, contrary arguments have been deduced from the legal analogy of succession to property in land. Chief Justice Coke in the seventeenth century called the right to a summons a fee simple; but it has lately been pointed out that it is rather like 'an estate tail created without words of limitation and incapable of being barred' (Sir W. Anson²). The point is, that the old baronies by writ were so free that they descended to all lineal, though apparently not collateral heirs, and even, as we have seen, to heiresses who could transmit to their husbands the presumptive right to the reception of a writ of summons.

And so things might have continued but for the discovery of a new method of creation, which limited the hereditary succession of titles to a stricter course of descent, and ultimately established in the narrowest and most uncompromising fashion the hereditary character of the House of Lords. This was the method of *creation by letters patent*. Hitherto, in Mr. Freeman's phrase, the 'right of the earls was immemorial; the right of the barons had grown up by usage.' But in 1328 Edward III, or rather his governors, began to create earls, that is, to grant the title as an hereditary rank, by letters patent or by charter. The new grades of peerage introduced by Edward III and his grandson respectively of Duke (1373) and Marquess (1386), together with the slightly later Viscount, were so created from the very first. The creation took place with ceremonies in Parliament, and the descent of the title was generally limited to the heirs male of the recipients. The practice was extended in 1387 to barons, whose title, with the creation of new classes of peers, tended to denote a rank and not to remain merely the term descriptive of the status of nobility. This mode of creation did not, however, become the rule until 1446, from which time it gradually superseded the old method by writ of summons until, by the time of the

Tudors, the latter had ceased altogether as a means of calling new members to the House of Lords.

There have been many conjectures as to the exact *object* of the introduction of this new method of creation. Mr. Freeman thinks¹ that 'one motive was to assert the king's power of free summons in another shape, after baronies by writ had fully become hereditary,' since by the terms of the patent the grant could be limited to the lifetime of the recipient or to succession in any specified line of his descendants. From a slightly different point of view it has been regarded as dictated by the desire to limit the peerage in the direct line of descent; while from the side of the baronage it was encouraged as entirely and finally removing out of the power of the Crown the control of the issue of the summons to the hereditary successors of previous recipients. The real advantage of the new process was that it simplified all questions relating to disputed titles, since they could mostly be solved by reference to the original patent; while its most important result was that it completed the hereditary character of the House of Lords towards which everything had been tending, defined its limits as an Estate of the realm, and exchanged the old claim of the barons to represent the Commune Concilium of Magna Carta for the more modern position of the theoretical equality of an 'Other House' tending towards the legislative dependence of a Second Chamber.

It has just been said that one of the advantages of creation by patent has been thought to have been the power which it gave of the restriction of the rights of peerage to the shortest available time—the period of the life of the grantee. But Dr. Stubbs believes that 'it is not probable that the Crown ever contemplated the creation, by such single summons, of a barony for life only,' and he conclusively explains away the single or irregular appearance of a considerable number of persons who are recorded among the barons summoned to Parliament from 1295 to 1485². This seems sufficient refutation of the admissions of lawyers, the conclusions of the Lords' Committee in 1819, and the contention of Mr. Freeman, as to the undisputed right of the Crown in this matter. 'The ancient right of the Crown to create peers for life, never abolished, never seriously questioned,' disappears into the

¹ *Essays*,
4th Ser.
p. 461.

² *Const. Hist.* § 428,
and note
on
Prynne's list.
³ *Essays*,
4th Ser.
p. 473.

limbo of historic fancies when it is remembered that such questions could not arise until the reception of a writ of summons had grown into a prescriptive right, and that, since that rather vague date, there is no authenticated instance of such a creation. The apparent exceptions to this rule in the case of peers fall into two classes: they are either grants of higher rank in the peerage, such as that of the dukedom of Exeter to Thomas Beaufort in 1416, or grants of baronies with an express provision that the holder should not sit in Parliament. Such were the creation of the baronies of Hay in 1606 and of Reede in 1644; and the limitation must of course have been expressed in the accompanying patent. The creation of peeresses for life under the later Stuart and the Hanoverian sovereigns need only be mentioned in order to omit no point in this particular subject. In the middle of the present century an attempt was made at the revival, as it was thought, of this ancient prerogative of the Crown. In 1856 Sir James Parke was by patent created Lord Wensleydale for life, and a special clause was inserted entitling him to a writ of summons to the House of Lords. Now, it had been settled by the Lords in two cases, already noticed, under Charles II, that the reception of a writ of summons, if followed by the taking of the seat, constituted an hereditary peerage. It was for this reason that Lord Wensleydale, a childless man, had been created by letters patent. But the Lords altogether refused to receive him. It was acknowledged that the Crown could create life peerages by patent: the comparatively recent cases of Lords Hay and Reede, just noticed, left no doubt in the matter; but for four hundred years there was no instance of a new life peer in the House of Lords; and if it were lawful to act upon precedents, doubtful at the best and drawn from rudimentary stages of the constitution, it would be as much within the competence of the Crown to go behind the Reform Bill and to revive the power undoubtedly once exercised, of issuing writs to unrepresented places, as to change the constitution of the House of Lords by the creation of life peers who should have seats in that assembly.

Growth of
the idea of
peerage.

We have now examined the qualifications for members of the baronial estate until the earlier methods were absorbed in the general method of creation by letters patent accompanied

by a writ of summons. The hereditary lay members of the House of Lords owe their seats to this double qualification. A writ, once complied with, of itself creates an hereditary title; the issue of letters patent alone does not entitle to a seat within the House. Thus there may be peers who are not Lords of Parliament, and it will be shown that there are Lords of Parliament who are not peers. But this was by no means always so. For the first two centuries of the existence of the House of Lords as such, the peerage was coextensive with membership of that body. It will first be necessary to mark the chief steps in the *growth of the idea of peerage*, and then to describe the means by which the House of Lords has come into its present anomalous condition.

The term *pares* is used in Magna Carta (§ 39) in the general sense of fellows or equals, trial by whom is secured to all free men. Nor is it in any other sense of the word that in 1233 the English barons made, on behalf of Richard, Earl Marshall, and the other baronial leaders, that claim of the right of being tried by their peers which drew from the royal minister, Peter des Roches, the contemptuous retort that there were no peers, in the French sense of peerage, in England. There is a curious but unverified story of a much later date, that Henry III in his later years formally ordained by Statute that no earls or barons should come to Parliament except such as should be specially summoned by the king. Whatever be the truth or value of this, it was Edward I's selective policy which must have given rise to the idea of peerage; for the fact would almost of necessity have preceded the legal recognition of the status, and this recognition came almost immediately. In 1321 it was in the name of the peers, among whom, it is noteworthy, the bishops were not included, that judgment was passed in Parliament against Edward II's favourites, the Despencers. It might be contended that the offenders were members of the baronage; but in 1330 the earls and barons as peers of the realm condemned Queen Isabella, the mother of Edward III, and her favourite Mortimer, protesting at the same time that they were not bound to sit in judgment upon 'others than their equals.' This was very shortly followed by the definite separation of the baronage into a House of their own. Finally, in 1341, in response to the claim of Arch-

Its gradual
establish-
ment.

5 Ric. II,
st. 2. c. 4.

bishop Stratford in his quarrel with Edward III, the Lords reported to the king that on no account should peers be brought to trial except in full Parliament before their peers; and this claim of privilege received the royal confirmation. But the mere assertion of the claim is the strongest witness to the growth of a corporate spirit among those who made and supported it; in other words, it must have been made on behalf of a definitely constituted body. Thus the Statute of 1382 already noticed, which established, or perhaps merely recognized, the hereditary right to the reception of a summons, was a necessary corollary to the establishment of the corporate idea. The ultimate attainment of the idea was the result, in one way, of the use of letters patent; but in another way, of the necessary policy of the Lancastrian kings. For since the title of this dynasty to the throne depended entirely on parliamentary recognition, the recognition, in order to be constitutional, must needs come from an assembly whom the country would acknowledge, and not from an arbitrarily summoned body of partisans. The whole tendency of these sovereigns, therefore, would be towards giving to an assembly already constituted the status and privileges which its members sought.

English
and foreign
nobility.

Not until the Lancastrian period, then, can it be definitely asserted that the House of Lords was established, or the peerage in its modern sense fully constituted. It will not be necessary here to do more than draw attention to the *difference between a foreign nobility*, in which all the members of certain families formed a privileged caste, and *the English peerage*, in which certain privileges are attached to a limited number of definite individuals. There are, perhaps, two reasons for this most important distinction. In the *first* place, the special privileges of an English peer are the outcome of his position as a member of the House of Lords. 'In other lands,' says Mr. Freeman, 'the assembly of the nobles was great and powerful because it was an assembly of great and powerful men; in England the peer was great and powerful because he was a member of a great and powerful assembly¹.' And, *secondly*, the official character of the old English Witan so far clung to the later barons that, when the hereditary principle was established, the official

¹ *Essays*,
4th Ser.
p. 493.

privileges of the members of the assembly were secured to the heir alone.

Now, it is necessary to note at this point that, at the first establishment of the peerage, about half of those who came under this designation did not owe their position to any hereditary right at all.

The Commune Concilium, as defined by Magna Carta, was composed of archbishops, bishops, abbots, earls, and greater barons, together with the smaller tenants-in-chief who shortly fell out of attendance at the Council altogether. The archbishops, bishops, and earls were a settled number, but among the abbots, as among the greater barons, the king exercised a choice by means of the special writ. The result was that until the Reformation, as regards the spiritual barons, the House of Lords contained two archbishops, nineteen bishops, and a similar number of abbots, making in all a body of between forty and fifty members with corporate interests. In the dearth of lay barons the ecclesiastics commanded the majority, but the irregularity of their attendance entirely neutralized their power. It has been noticed that the bishops' claim to form part of the Commune Concilium did not depend on the possession of the temporal barony, with which the Conqueror had first endowed them. The abbots and priors stood on a different footing, and made strenuous efforts to escape attendance by proving that they held their lands in frankalmoigne or otherwise than as a barony from the Crown. The result was a decline in their numbers from about sixty under Edward I and II, to an average of twenty-seven under their successors. These continued to be summoned by writ until the destruction of the monasteries removed the reason for their presence. A unique case is that of the Abbot of Tavistock, who, having by Henry VI's permission obtained from the Pope the right to wear a mitre and other episcopal insignia, was in 1515 made a spiritual lord of Parliament by letters patent.

Meanwhile, the twenty-one archbishops and bishops were increased by the foundation of five new bishoprics under Henry VIII out of the spoils of the monasteries. No other see was formed until that of Ripon in 1836, followed by Manchester in 1848; and in the Act providing for the foundation

✓
The
Spiritual
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Parliament.

Qualifica-
tion of
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Position of
bishops in
Parliament
since Re-
formation.

of the latter, as well as in subsequent Acts of the same tenour, a clause is inserted to prohibit the increase of the number of lords spiritual. There are at present in England thirty-four bishops, besides a number of suffragan bishops, who though spiritually yet are not officially equal to diocesan bishops, and have therefore never been eligible for a seat. Of these, the holders of the Sees of Canterbury, York, London, Durham, and Winchester are, by virtue of their bishoprics, entitled at once to a writ of summons: the other twenty-nine supply the rest of the twenty-six seats in order of seniority. To these were to be added from the Act of Union with Ireland (1800) to the disestablishment of the Irish Church (1869) one archbishop and three bishops of the Irish Church, sitting each in rotation for a single session. More than one attempt has been made, especially in the second quarter of the present century (1834, 1836, 1837), to exclude the bishops from the House of Lords. Until very recently they had for four centuries formed the only purely non-hereditary element in the House. For two short moments in the seventeenth century, as Mr. Freeman has pointed out, the House of Lords was a purely hereditary body, from the Exclusion Bill of 1642 to the abolition of the House of Lords in 1649, and again from the meeting of Charles II's first Parliament in 1660, which treated the Ordinance of 1649 as void, to the definite Act by which in 1661 the Exclusion Bill was rescinded and the bishops were restored to their places in the House¹. Yet, setting aside this revolutionary break in their history, they, or, in the strictest sense, the holders of the five senior Sees just enumerated, 'are the only class of men who keep their seats in Parliament by old traditionary right.' They 'still hold the same seats by the same tenure as when Anselm braved the wrath of Rufus... as when Stephen Langton read out the charter of Henry'; and finally, in Mr. Freeman's uncompromising words, 'the lords spiritual are the ancient Witan, the official Witan, keeping their ancient places alongside of the newer hereditary class which has sprung up around them'².

¹ *Essays*,
4th Ser.
p. 466-8.

² *Ibid.*
pp. 500-1.
Abstention
of the
lower
clergy from
Parliament.

But Edward I had desired that the spiritual Estate should have a more thorough parliamentary representation than it could get by the presence merely of its ecclesiastical leaders. We have seen that in 1294 he called representatives of both

the cathedral and parochial clergy to a separate assembly of the spiritual Estate, and that in 1295 he placed them alongside of the two lay Estates. But the clergy, as an Estate, altogether refused to acquiesce in his plans. They already had their own assembly in Convocation, in which they had met for the last seventy years. Now, each archiepiscopal province had its own Convocation, which contained not only the ecclesiastical hierarchy, but also a full representation of the cathedral and parochial clergy. The system of representation in each was slightly different, and mutual jealousies prevented any amalgamation; but it was in Convocation that the clergy were taxed by the Pope; and with the papal sanction, 'and of their own free will,' voted their tenths to the king. For this double provincial representation of the clergy, Edward wished to substitute one national representation in Parliament; while his outlawry of the clergy in 1296 showed his determination that they should not escape their share of the national burdens. Thus the point for settlement was the assembly in which the clergy should vote their money. On the one hand, the king's desire to carry out his scheme led to the insertion from 1311 to 1340, in the writs to the archbishops, of a special clause beyond the usual 'praemunientes' clause, enjoining on the fathers of the Church to compel the attendance of representatives from their flocks. But, on the other hand, the clergy voted their grant of money as regularly and at the same time as the other Estates, and at the rate, namely one-tenth, which was paid by the wealthier portion of the community. Consequently, the king was not disposed to complain, and the clergy continued to vote their grant in Convocation until the reign of Charles II, when, by a mere verbal agreement between Lord Chancellor Clarendon and Archbishop Sheldon, the right of separate clerical taxation, which had become a mere form, was surrendered, and the clergy in return took their place among the constituencies of the House of Commons.

But it must carefully be noticed that the clergy did not altogether stand apart from Parliament. In the *first* place, of course, the higher clergy took their place as lords spiritual among the peers; although an arrogant resolution of the Lords themselves under the Tudors asserted for the hereditary members alone the privileges of peerage. But, *further*, the

The clergy
in Parlia-
ment.

special clause added to the writs seems to have produced an occasional response. Two noteworthy instances (1321 and May, 1322) occur as a result of Edward II's bid for popular favour against his cousin, Thomas of Lancaster, and the baronage. Under Richard II, again, there are proofs that clerical proctors occasionally attended the Commons. Such at least was the position of Sir Thomas Percy in the Parliament of September, 1397, and such is probably the explanation of the presence of Sir Thomas Haxey in the January Parliament of the same year.

Results of
their
abstention.

These instances are, after all, but a slight qualification of the general attitude of abstention from Parliament on the part of the spiritual Estate. And this abstention had important *results*. For in the *first* place, as early as the reign of Edward III and onwards to the Reformation, frequent attacks were made upon the Church in the Commons, which their presence would undoubtedly have averted or mollified. *Again*, under Richard II, in acknowledgment of the attitude which they had taken up, the form of summons to the clergy through the archbishops, though continued even to the present day, was slightly changed. Hitherto they had been called like the Commons, 'ad faciendum et consentiendum.' Since 1340 there had been temporary alterations, but the form now became fixed to 'ad consentiendum' alone: a function which could be adequately discharged by absence.

Change in
application
of term
Peers.

§ 22. So far, then, it has been seen that the peerage at its first establishment consisted of two classes of persons—the chief officials of the Church, and laymen holding their titles by hereditary descent. It was not long, however, before the term underwent a change of meaning, and the general outcome of the history of the intervening centuries has been that, so far from the peerage being conterminous with the right to sit in the House of Lords, there are now Lords of Parliament who are not peers, and there are peers who not only do not, but even who may not have a right to become Lords of Parliament. It is worth while to inquire, how it has come about that *all Lords of Parliament are not peers*.

Reason for
the change.

It is to the introduction of the new ranks of Duke, Marquess, and Viscount that we must probably attribute the growth of 'the notion of the temporal peerage as an order distinct both from

all who are not Lords of Parliament and from the spiritual lords also¹. For their existence afforded the spectacle of 'five classes' ^{1 Freeman, Essays, 4th Ser. p. 461.} of men who were not peers in the sense of strict equality among themselves, but who were peers in the sense of having each of them an equal right to something peculiar to themselves, something which was so far from being shared with any who were not Lords of Parliament that it was not shared by all who were' (Mr. Freeman²). The result was the growth ^{2 Ibid. p. 463.} of the *doctrine of ennobled blood*, stigmatized by Dr. Stubbs as 'historically a mere absurdity³'. 'The peerage of the ^{3 Const. Hist. § 430 note.} temporal lord,' again to quote Mr. Freeman, 'came to be looked on as something inherent in the blood, something which could not, like the official seat of the churchman, be resigned or lost except by such legal processes as involved "corruption of blood⁴." So long as the ecclesiastical element ^{4 Essays, p. 464.} predominated in the House, it was not possible to take full advantage of this theory; but the disappearance of the abbots in the course of the Reformation left the laymen in an ever-increasing predominance of numbers; and, by a series of resolutions of the House itself, they proceeded during the next two centuries to *concentrate the claims of privilege of peerage in the hands of the lay and hereditary members* of the House of Lords. Thus by a series of decisions on disputed peerages which have been already individually mentioned, they have laid down, on the one side, that a documentary record of compliance with a writ of summons constitutes an hereditary peerage; while, on the other side, a peerage cannot be alienated or surrendered to the Crown except by forfeiture for treason; nor, going even a step further, does the issue of letters patent of themselves confer a title to a seat in the House of Lords. All the resolutions practically had for their object not so much the limitation of the royal prerogative in the creation of peers, though at moments they almost seem to take that shape, as the assertion of the right analogous to that exercised by the House of Commons as judges in the validity of elections of members of their own assembly.

But there was one class of members—the *bishops*, the ^{Its effect on bishops;} validity of whose appointments the lay Lords could not call in question. With them they dealt in an entirely different manner, and by a resolution of 1592 they simply denied

to them the status of peerage altogether. The chief right thus withheld was the privilege of trial by the House of Lords, and certainly the action of the Tudor sovereigns in submitting the trials, whether of Bishop Fisher on the one side or of Archbishop Cranmer on the other, to the verdicts of juries in a Court of Common Law, seemed to exemplify beforehand the doctrine expressed in 1592. The peers seemed to have forgotten not only that the bishops had immemorial rights which belonged to the earls alone besides, but that the actual individual in whose person they had won acknowledgment of the very privilege now withheld, was no other than the Archbishop of Canterbury. The lay peers may be said to have stultified themselves by the appointment of a committee in 1661, on the restoration of the bishops to the House of Lords, 'to consider of an order in the standing order of this House which mentions the lords, the bishops, to be only Lords of Parliament and not peers, whereas several Acts of Parliament mention them to be peers.' Yet, notwithstanding this practical confession of the untenability of their attitude, the lay peers returned to the charge; and, although there was no question that the bishops might vote on a bill of attainder, while even the Constitutions of Clarendon (§ 12) had so far relaxed the Canon Law as to allow them to share in all judicial proceedings up to a point that might involve the decision of a mortal sentence; yet in the impeachment of Danby in 1679 the lay lords tried to prevent the bishops from taking part in even the preliminary stages of the trial. *The bishops then, or twenty-six of their number, are Lords of Parliament, but not peers.*

There was another noteworthy class whom the doctrine of ennobled blood entirely shut out from participation in the action of the House of Lords. From the time of Henry II on judges. the *judges* were an important item in the Royal Council. Their right to be present could be based only on official grounds; but the writs addressed to them were for some time almost identical with those issued to the barons. In fact, as far as mere counsel went, the presence of one was as important to the king as that of the other. The framing of the ordinances and, until late in the fifteenth century, of parliamentary statutes was in their hands: they would be subject to continual appeals

on all legal and constitutional questions which might arise : they were in fact, in no necessarily invidious sense, the interpreters and defenders of the royal prerogative. But when taxation was in question, the judges would have to stand aside ; they had no voice in the decision either as individuals or as representatives. And since the chief or at least the primary work of the Commune Concilium, as of the later Parliament, was the grant of taxes, the judges never became incorporated into either body. But another important function of the Commune Concilium was that of a Court of Justice. This originated in the early connexion between the Concilium Ordinarium and the Commune Concilium, which made them at times almost indistinguishable in their action. The supreme, or rather 'residuary,' judicial power of the Crown, was exercised at first through the Curia Regis, and then in the Concilium Ordinarium. It was because the Commune Concilium might be regarded as an enlarged session of the Concilium Ordinarium, that it could wield judicial authority as delegated to it from the king ; just as the Concilium Ordinarium might be said to owe its legislative power by Ordinances to the connexion of its chief members with the greater legislative body. But as the Commune Concilium passed into the House of Lords, this judicial power was along with other powers appropriated by the members of that body. The establishment of the privileges of peers in 1341, the spread of the method of creation by patent, the growth of the doctrine of ennobled blood, all tended to shut out those members of the Commune Concilium who were unable for some reason to respond to the newly asserted qualifications for full membership. The judges, like the bishops, held a purely official position, with this difference, that unfortunately their tenure was much less secure. They had not, as the bishops, the claims of ancient right, territorial position, or inalienable office. They were entirely at the mercy of the king ; and the new hereditary peers, who sought to limit the capricious interference of the Crown with their assembly, closed their ranks and shut out, among other anomalous and casual councillors, those whose presence would seem to be particularly desirable in the discharge of important judicial functions. Almost at the same time, the *Commons* definitely repudiated for themselves the exercise of any judicial

powers. In the first Parliament of Henry IV, after the condemnation of Richard II's advisers by the Lords, the Commons made a protest to the effect that 'no record may be made in Parliament against the Commons, that they are or will be parties to any judgments given or to be given hereafter in Parliament,' to which answer is made that 'the King and the Lords have of all time had, and shall of right have, the judgments in Parliament¹.'

¹ Stubbs,
Const.
Hist. § 303.
Jurisdiction of
House of
Lords.

§ 23. *The Jurisdiction of the House of Lords* has been of several kinds. In the first place, it was concerned with the trial of offenders who were too powerful to be dealt with by the local Courts. Akin to this was the system of Appeals in Parliament, by which private accusers obtained before Parliament the trial of a person charged with treason. But as the Concilium Ordinarium grew into the powerful Privy Council, which was organized, on its judicial side, into the redoubtable Star Chamber, the punishment of over-mighty subjects was monopolized by the smaller body; while Appeals in Parliament were forbidden by the first Parliament of Henry IV, until they may be said to have revived in an altered form in the Acts of Attainder, which at times during the ensuing centuries were so freely used.

In Trial
of Peers.

Impeachment.

But with the growth of peerage came the practice of *Impeachment*. The Commons desired to maintain a hold over the ministers of the Crown. The law of England sanctioned trial by peers, and the peers of a minister were generally to be found among the peers in the technical sense of members of the House of Lords. Thus arose that anomalous mode of trial in which the Commons were the accusers before the Lords as judges. The first instance of its use was the impeachment by the 'Good Parliament' in 1376 of two lords, Latimer and Nevill, and four commoners for malversation in the administration. Their newly acquired power was in the next reign confirmed to the Commons by the impeachment of the Chancellor, Michael de la Pole, Earl of Suffolk (1386). For more than sixty years the power seems to have remained in abeyance, until it was revived for the punishment of no other than the grandson of Michael, William de la Pole, Duke of Suffolk (1449). The Commons, however, afraid that he would elude their grasp, proceeded by *Bill of Attainder*, a legislative

act, needing no evidence to support it, but pronouncing guilt and sentence and passed in the same manner as any other Statute. Under the Tudors the kings made use of Bills of Attainder to destroy their political or dynastic opponents. Impeachments were revived in 1621, and—except in the cases of Strafford (1640), Laud (1641), and Sir John Fenwick (1696), when Bills of Attainder were ultimately substituted for them—they formed the chief means of attacking political opponents until the accession of the Hanoverian sovereigns. Since the impeachments of Oxford, Bolingbroke and Ormond for their share in the Treaty of Utrecht, there have only been three cases of the exercise of the power; those of the Earl of Macclesfield (1725) ‘for high crimes and misdemeanours,’ that is, peculation in his office as Lord Chancellor; of Warren Hastings for mis-government in India; and of Lord Melville (1804) for supposed malversation in his office: but none of these was in a strict sense for political reasons. Meanwhile, numerous questions had arisen in connexion with impeachments and had been gradually disposed of. Thus, the case of Fitzharris in 1681, though its own course was the reverse, practically decided for all subsequent cases that a commoner might be impeached for high treason. Again, in the case of Danby it was settled both that bishops had a right to vote on the trial of peers in capital cases, ‘till the Court proceeds to the vote of guilty or not guilty,’ and that no impeachment can be stayed by the production of a pardon from the king. Another important question bearing on the same point was also raised in this trial, as to whether an impeachment was ended by the prorogation or dissolution of Parliament, but it was not settled in the negative until more than a century later in the case of Warren Hastings (1791).

The House of Lords asserted a further power *as a Court of First Instance*, for it claimed to find law in cases of importance where the Common Law Courts failed either wholly or partially to give redress. But Chancery gradually formed itself for this very purpose, and formulated a body of law which, despite the resistance of the Common Law Courts and even of Parliament, it carried into practice. A controversy of James I's reign, to be mentioned elsewhere¹, placed the Common Law Courts¹ Chap. vii. under the supervision of Chancery; but yet the Lords clung to

In cases
of First
Instance.

their original claim and, upon reference from the Crown, undertook to try the dispute between *Skinner and the East India Company* in 1668. The interposition of the Commons on behalf of the Company turned the matter into a quarrel over parliamentary privilege; but in the end the Lords practically admitted that they had no jurisdiction as a Court of First Instance.

On Appeal. It is as a *Court of Appeal* that the House of Lords has retained a prominent position in the judicial system of the country. Its original power in this respect was exercised in response to a writ of error from the Common Law Courts 'alleging error of law appearing upon the face of the record.' In the early part of the seventeenth century, while Chancery assured its jurisdiction over the Common Law Courts, the House of Lords assumed jurisdiction by way of appeal over Chancery. This led to the case of *Shirley v. Fagg* (1675), by which this appellate jurisdiction of the House of Lords was as much confirmed as its primary jurisdiction had been repudiated in the almost contemporaneous case of *Skinner v. the East India Company*. Appeals from Chancery came by way of petition to the Lords and were 'of the nature of a rehearing.' The Judicature Act of 1875 placed appeals from the Common Law Courts on the same basis by causing the abolition of proceedings in error; and the Appellate Jurisdiction Act of 1876 for the first time placed the judicial authority of the House of Lords in this matter on a statutory basis. But this Act gave rise to a far greater innovation; for it authorized the creation of Lords of Parliament, who were neither peers nor yet possessed of hereditary right. Indeed, as they were first planned, their title to be even Lords of Parliament lasted only so long as they discharged the functions of Lords of Appeal for which they were created. But the two Lords of Appeal, now increased to four, have by a subsequent Act of 1887 been permitted to keep their seats for life. The object of these appointments was to increase the efficiency of the exercise of the judicial functions of the House; and, although in the hearing of appeals every member of the Lords is entitled to be present and give his vote, a convention dictated by obvious propriety has left the decision in the hands of those members of the House who are past or present holders of high judicial office.

§ 24. It has been truly remarked (Mr. Freeman) that the consolidation of the House of Lords has saved the country from the curse of a noble caste¹. For the English peerage differs from a foreign nobility in that its *privileges attach to the person* and not to the family. In the eyes of the law the children of a peer are commoners in rank, and whatever privileges he may enjoy belong to him individually and in no way extend to them. Moreover, such privileges are enjoyed by the peer *not as an individual but as member of an assembly*. The foreign nobleman is great in himself: the English peer is great because he is one of a great and powerful body. Thus all the peers' privileges are enjoyed in connexion with that assembly. Although the Lords are supposed to hold these privileges from time immemorial, and do not therefore, like the Commons, go through the form of petitioning for them to the Crown, yet many of their privileges are naturally of the same nature as those which will be dealt with in speaking of the House of Commons. There are, however, considerable differences in details. Thus *freedom from arrest*, except from criminal charges, is claimed by both Houses; but the Lords have never renounced the extension of that privilege to their servants and followers. The parallel privilege of *not being impleaded in civil actions* was by law gradually reduced and finally withdrawn altogether from members of both Houses. The right of *guarding the constitution of their own assembly* is also common to the two Houses; but while the Lords can refuse to allow a new peer to take his seat, who has not fulfilled the usual conditions, it lies in the power of the Crown to decide in all cases of claims to an old peerage, although, as a matter of fact, such cases are usually referred to the House itself. Again, while it is in the power of both Houses to *commit an individual for contempt* of their orders, the House of Lords can pass sentence for a definite term, nor is the prisoner released on the prorogation of Parliament. *Freedom of speech* is no less important to the Lords than to the Commons; and violations of it, though not so frequent as in the Lower House, have been not altogether unknown. Three special privileges the Lords seem to have enjoyed to themselves. In the first place, every individual peer in his capacity of an hereditary councillor of the Crown has the

Privileges
of the
House of
Lords.
¹ cf. p. 133

right of personal *access to the Sovereign*. Secondly, until the Lords waived the right by resolution in 1868, they could, unless the sovereign demanded their personal attendance, give their votes by *proxy*. This custom dates back perhaps to a time when it was important that the Crown should ensure in any shape the assent of the barons individually to the money voted and the laws passed by the Commune Concilium. Thirdly, the peers have frequently exercised a right, which apparently it would be equally open to the Commons to assume, of recording a *protest* against any division on the Journals of the House. Finally, in the case of two more strictly personal privileges, Lords and Commons alike have waived their claim to be exempt from appearing as *witnesses* in a law-court; while the privilege of freedom from the necessity of serving on a *Jury* has since 1870 been secured to the members of both Houses by Statute.

CHAPTER IV.

THE HOUSE OF COMMONS.—ITS FORM.

§ 25. So far we have traced the growth of the legislative body as a whole up to the completion of the form of the *Model Parliament* in 1295; and have then followed the fortunes of the old Commune Concilium, which it superseded, until the members of that assembly, with more definite, if not with actually new qualifications, gradually passed from feudal tenants-in-chief to peers, and their assembly from the House of Lords to the Other House and so to the Second Chamber. The decadence of the House of Lords involves the rise to power of the House of Commons. And the first question involved is, who were THE MEMBERS OF THE HOUSE OF COMMONS? It has been already shown that the Estate of the Commons consisted of two distinct parts—Knights of the Shire, and Citizens and Burgesses. Of the *Knights of the Shire* there were originally and normally two from each of thirty-seven shires, making a body of seventy-four, permanent in numbers though not in individuals. The omitted shires were Chester and Durham, which were counties palatine, and Monmouth, which at first formed part of Wales. Members from the twelve Welsh shires were called by Edward II to the important Parliament of 1322, and again in 1327 by Mortimer after the deposition of that king. But they obtained no permanent status in Parliament until the reign of Henry VIII. From 1536 onwards, each of the Welsh shires was summoned to contribute one representative; while Monmouth, now as an English shire, sent two. A few years later, in 1543, Chester for the first time sent two members; and, finally, Charles II, in 1673, included Durham in the parliamentary system of the country. Thus the representatives of the shires remained until the eighteenth century, when the Union with Scotland

The members of the House of Commons.

Their number for (1) the shires;

(1707) added thirty members for the shires, and the Union with Ireland (1800) added sixty-four on a like account.

Effects of
the Reform
Acts.

The First Reform *Act of 1832* split up several shires into electoral districts, and increased the number of shire Representatives in England and Wales by sixty-five. The Representation of the People *Act of 1867* added forty-four members for English and Welsh, and three for Scotch shires; and, finally, the *Act of 1884* raised the number for England and Wales to 233, and fixed it for Scotland at thirty-nine, and for Ireland, which had been untouched in 1867, at eighty-five.

(2) the
boroughs.

The *members for cities and boroughs* exhibit much greater fluctuation in number. Under Edward I representatives from 166 were at one time or another summoned; but although two from each was the orthodox number, sometimes it varied between one and two according to the size of the borough. But immediately, for reasons and by methods to be noted presently, a decline in the number of represented boroughs is to be marked. Under Edward II the number represented altogether was 127: under Edward III it sank further to ninety-nine, at which it was arrested by the Statute of 1382 forbidding the sheriff to omit any city or borough which had been wont to send representatives. For the next sixty years the parliamentary boroughs remained at this number. They were very unevenly distributed over the country. Thus, between the reigns of Edward III and Edward VI, the three shires of Lancashire, Hertfordshire, and Rutland sent no burgesses at all; while fifteen others supplied members from only one borough, and seven others from only two boroughs in each shire. On the other hand, it is noteworthy that London, though only required to send two members, nominated four in order to ensure the attendance of two, and from 1378 onwards the representation required of London was permanently raised by writ to the higher number. Thus for the years following 1382 the borough representatives may be placed at 200.

Immediate
diminution
of the
number.

Its sub-
sequent
increase.

Hitherto one of the methods by which boroughs had escaped their constitutional liabilities had been through royal charter. Under Henry VI for the first time, commencing from 1445, the king by *royal charter* created new parliamentary boroughs. At first these were perhaps not necessarily so much new

as renewed representations. Of Edward I's 166 represented towns, more than seventy had for one reason or another dropped out of Parliament. Edward II added ten on various occasions, and Edward III's only permanent addition was the Cinque Ports, eight in number and each sending two members. Now, by the new method of charter, Henry VI added eight boroughs to the representation of the country, and Edward IV imitated him by the creation of four more. It is to the Tudor period that we must look for an extensive use of this method. It seems right to think that Henry VIII's five or six additions were made with no sinister motives; but when of Edward VI's eighteen creations seven are found to be in Cornwall, which was the property of the Crown, it is clear how powerful a means of influence over the House of Commons this method of creation had placed in the hands of the king. It is, indeed, to be read in connexion with the narrowing of the borough constituencies, also effected by charter, which was going on at the same time. Further creations of boroughs, then, may be attributed almost entirely to sinister designs. Thus, Mary called into existence fourteen with twenty-five members in all; Elizabeth no less than thirty with two members apiece: and James I imitated them by twelve additions. It is fair, however, to say that royal charter was not the only method of increasing the number of borough representatives. Some towns sent members in compliance with *special statutes*, and some as a result of a granted *petition for the revival of old rights* of representation. Indeed, under James I, 'there was a strong tendency to revive such ancient and forgotten rights of representation, and the House of Commons resolved on May 4, 1624, "that a borough cannot forfeit this liberty of sending members by non-user".'¹ As a result of this resolution fifteen boroughs regained parliamentary representation under the two first Stuarts. In one way and another, then, 180 members were added to Parliament between the reigns of Henry VIII and Charles II, the last instance being the grant of two members by royal charter to the borough of Newark; and the representatives of the boroughs at the end of the seventeenth century, were over 400 in number. The Union with Scotland added fifteen borough members, and that with Ireland thirty-six on a like account.

¹ Anson,
*Law and
Custom of
Const.* i.
120.

Effects of
the Reform
Acts.

The Reform *Act of 1832* made great changes both in the number and the distribution of the borough seats. Fifty-six boroughs represented by 111 members were absolutely disfranchised; and thirty-one were deprived of one of their members. Of these 142 the larger proportion were given to English counties (sixty-five), and to the increase of the representation in the other parts of the British Isles. The rest were distributed among twenty-two hitherto unrepresented large towns which acquired two members each, and twenty-one smaller towns which should supply single members to the House of Commons. By the *Act of 1867*, fifty-two seats were cancelled by partial or total disfranchisement of boroughs, of which only twenty were redistributed among towns in England and Wales, whether by the addition of an extra member to, or by the subdivision of already existing constituencies, or lastly by the creation of entirely new parliamentary boroughs. Finally, the *Act of 1884* cancelled no less than 160 borough seats, which were redistributed almost entirely (for only eight new boroughs were created) among already existing electoral divisions, on the totally new principle, except in certain specified cases, of single-member constituencies based upon an attempt at equal electoral districts. The result in numbers is that English boroughs now claim 227 members, to which eleven are to be added on account of Wales, while Scotch boroughs supply thirty-one and Ireland sixteen to the sum total.

That *sum total of the whole House of Commons* has almost steadily increased. A mediaeval House in the fifteenth century contained about 300 members; by the end of the Tudor times it had been increased to 460; and when the royal methods of addition ceased under Charles II, it stood at 513. The Unions with Scotland and Ireland brought it up to 658, a number unaltered by the First Reform Act of 1832, or the Representation of the People Act of 1867, despite its temporary reduction through the disfranchisement of certain boroughs for corrupt practices. Finally, the Act of 1884 has slightly increased the total number to 670, of which England claims 465 and Wales 30, while to Scotland were awarded 72, and 103 to Ireland.

§ 26. The new principle of an approximation to equal

electoral districts, together with the assimilation of the county and borough franchise, of which something will presently be said, has gone far to obliterate the old *distinction between county and borough members*. It was, of course, originally intended that the two classes should represent different interests, namely those connected with real and with personal property respectively, in other words, land and merchandise. But a fortunate and early assimilation of interests, no less than of classes, brought about a close union of action between the two bodies of representative members. Nor was this unnatural. In the *first* place, the representative character was common to both classes of members. As we have seen, the number of the shire representatives was fixed, while that of the boroughs largely fluctuated; but the individuals of both bodies were equally subject to change, and it early became clear that their only hope of making their influence felt with the kings and lords lay in united action. In the *next* place, the interests of shire and borough members alike were local, as contrasted with the distinctly class interest of the baronage on the one hand, or on the other, of the two bodies within their own ranks—namely, the lawyers and the merchants—which in early parliamentary days threatened to consolidate themselves into separate Estates. These causes of joint action were *further* enhanced by the employment of the same agency—that of the Shire Court, for the election of both classes of representatives. But the *ultimate* reason of amalgamation is probably to be found in the fact that the social distinction between the two classes of knights and burgesses was almost from the outset very slight. Whatever it may have been originally, it was very soon bridged over by the wealthy merchants who, through purchase of freehold property, became members of the Shire Court and liable to distraint of knighthood, and the election for the shires of *valetti* or esquires, that is, men below knightly rank, in the extreme unwillingness displayed by the higher class to serve in Parliament. It had probably been in part the object of distraint of knighthood (or the compulsion laid on all holders of the requisite amount of land, no matter on what tenure they held it, to take up the duties of knighthood on penalty of a heavy fine) to ensure a sufficient supply, for the purposes of local government, of men of

Amalgamation of the county and borough members.

Reasons.

knightly rank. But men so shrank from the burden of attendance in Parliament, which was then relieved by no known corresponding advantages, that of the two alternatives they preferred to incur the fine. The Shire Courts were consequently compelled to return men of a lower social rank. Thus in 1325 only twenty-seven members were men of knightly status.

But the Crown did not accept this deviation without a protest. In 1340 the writs demanded the election for the shires of two 'belted' knights (*gladiis cinctos*); this was repeated in 1348, and after 1376 became practically a permanent description. Yet the effect at first was small, and in the Parliament which assembled in response to the last-mentioned writs, only half of the shire members were knights. Indeed, whatever effect there was in the intended direction was due rather to the social importance conferred on knighthood by the rise of the spirit of chivalry, and also to the increased political importance of a seat among the Commons, as Parliament made good its position against the Crown. But in any case the return of the wished-for class was very partial, and in 1445 the Crown yielded the point on which it had tried to insist, by assenting to a Statute which required the election for the shires of either knights or notable esquires capable of becoming knights, that is to say, of persons in any case above the rank of yeomen. At the same time, an attempt was made to restrain the choice of the electors, for not only was a Statute of 1413 embodied, which required that the representative should be a resident within the county or borough which chose him, but it was now demanded that in the case of the shires the representatives should be '*gentlemen born*.' This was a distinct attempt to undermine the constitutional principle, so important in the development of English life, of the legal equality of all freemen outside the small circle of the actual peerage. Fortunately it had no especial effect; members seem to have been drawn from the same class of person before and after the Statute; and, meanwhile, two results followed from the way in which this quiet struggle was decided. The amalgamation for joint action of the representatives of shire and borough was rendered easier, while at the same time the Crown and Parliament together obtained that upper class representation which was perhaps the real object of the former, and which

Qualifica-
tions of (1)
belted
knights for
the Shires ;

23 Hen. VI
c. 14.

1 Hen. V
c. 1.

(2) gentle-
men born
for the
Shires ;

formed so definite a feature of our parliamentary system down to 1832.

Yet despite this harmony and apparent similarity, the position of the landed gentry was as yet too assured for an equality of importance to be really possible between the representatives of both classes of the Commons. The knights of the shire were the undoubted leaders. 'They were,' says Dr. Stubbs, 'the leaders of parliamentary debate; they were the link between the good peers and the good towns; they were the indestructible element of the House of Commons; they were the representatives of those local divisions of the realm which were coeval with the historical existence of the people of England, and the interests of which were most directly attacked by the abuses of royal prerogative.' In short, *it was by the knights of the shire that 'the victory of the constitution was won'.* Indeed, until the time of the Tudors¹ no prominent member of the Commons, with one exception (i.e. Thomas Yonge of Bristol, imprisoned in 1451 for proposing that the Duke of York should be declared heir to the Crown), was representative of a borough. The reasons for this comparative insignificance of the burgesses are important. In the first place the attention of the townfolk was concentrated on the internal development of their trade and organization. It was during the fifteenth century that the monopoly of power by the guilds was causing the migration of artisans into the villages and the formation of journeyman guilds which led to the founding of what is known as the domestic system of manufacture. And at the same time the French wars, with their diminution of commerce and consequent heavy taxation, were producing an actual decay among the towns which finds expression in petitions, under Henry VI and his successors to the middle of the sixteenth century, for the remission of those portions of a subsidy which, on the assessment of 1334, should have been levied from them. Moreover, the external position of the boroughs was very weak. Their desire to escape the burden of representation left them, as will be described, at the mercy or manipulation of the sheriff, who could take bribes to omit them or could appoint his own nominees. But perhaps the chief influence in the weakening of the position of the boroughs is to be found in

Early weakness of the boroughs in Parliament.

¹ Const. Hist. § 272.

Reasons.

the selfish action of their great men. The merchants, whose wealth consisted increasingly of wool, were probably in the main country gentry and members of the Shire Courts. As such they lost touch with their fellow townsmen and were not unwilling for the sake of their own private gain to enter into separate dealings with the king.

Indeed, not only was the power of the Commons thus at times almost annihilated, but there seemed a *likelihood of the rise of a separate Estate of merchants*. For assemblies of merchants were from time to time brought together, which should grant supplies of wool to the king apart from Parliament. The first attempt to do this, made by Edward I in 1303, met with failure; but during the early years of Edward III it became a frequent method of raising supplies in the shape of either additional customs or free gifts. The king would often by such private negotiations renew the grants made to him in the previous Parliament, and nothing remained for the next Parliament but to authorize the taxation which had been so unconstitutionally obtained. But by the end of Edward III's reign this method of raising money gradually ceased. Not only did the Statute of Staples in 1353 regulate the export trade in wool, but Parliament by direct enactment in 1362, and again in 1371, prohibited such dealings with the merchants. These, however, would have been evaded, had not the merchants themselves discovered that Edward's demands on them were out of all proportion to the privileges which they obtained in return, and had they not therefore understood that their real interest lay in union with the Commons.

Their rise
to impor-
tance.

But meanwhile, the internal decay of the boroughs prevented them from taking a prominent part through their representatives in the affairs of the nation. It need not, however, be supposed that they were of no constitutional importance. We have seen that after 1382 their number was as fixed as that of the represented shires, and that the first change under Henry VI heralds a continuous numerical increase. Nor was it confined to mere quantity, for the adhesion of the towns was an important item in the victory of the Yorkists. But more significant are a few facts to be gleaned from the parliamentary history of the Tudor times. Thus, the Speaker of the House of Commons from 1532 to 1536

was member for a borough, and Henry VIII's minister, Thomas Cromwell, represented Taunton in Parliament. The reason for this *change in the character of burgesses* lies in the fact that representation was ceasing to be a burden. Of this generally there are many proofs. Thus, to select one which concerns our immediate question, an Act of Henry V's reign, already noticed (1413), had attempted to check the arbitrary manipulation of elections by the sheriff, among other ways, by enacting a *qualification of local residence* for the elected members. This, however, if it ever had any effect, speedily became obsolete, and in 1571 was repealed as regards burgesses. But for some unexplained reason the Act of 1571 never found its way on to the Statute book. The old Act of 1413 remained, though it was never enforced, and was not finally removed from the Statute book until 1774. But it is noteworthy that in the debate over the Bill of 1571 which contained the first reported speeches 'which discuss in detail the constitution and forms of Parliament,' one of the chief objections to the repeal of Henry V's measures was founded on the fear that 'Lords letters may henceforth bear all the sway,' that is, practically, that the Commons chose to be the nominees of the Crown rather than of the Lords.

The opportunities of the Lords had not yet come, but there was in this same Parliament a foreshadowing of the methods by which they were in the future to establish their influence. For we find the first instance of the purchase of a seat in the penalties imposed on the Corporation of Westbury for selling its representation to a certain Long, who himself, curiously enough, seems to have kept his seat. Of the multiplication of '*rotten boroughs*,' as they came to be called, by royal charter, mention has already been made. To those which were never intended to be other than nomination seats, were added towns whose constituencies had been subsequently narrowed, and towns which had stood still in condition or had actually decayed. The transference of power from the king to Parliament and the accumulation of great properties on the ruins of the yeomanry which marked the early years of the eighteenth century, placed many of these nomination seats in the hands of noblemen or wealthy commoners. Thus in 1793 the Duke of Norfolk had eleven seats in his gift, the Earl of Lonsdale was answerable

(3) local residence ;

(Nomin-
ation
Seats.)

¹ Erskine
May,
Const.
Hist. i. 333.

for nine members of the House of Commons, and other noblemen for a lesser number. 'Seats,' it has been remarked, 'were held in both Houses alike by hereditary right'.¹ In boroughs of a slightly larger size seats could be obtained either by out-and-out purchase, by the payment of an annual rent, or by a system of individual bribery. The example of Long found ready imitators as the growing commerce brought to the front a new class of ambitious men who had to make local connexions for themselves. Such especially were the 'Indian Nabobs,' adventurers who had returned from East and West Indies with ample fortunes, free from party connexions, and merely bent on serving personal ends. Their influence reached a culminating point in the early years of the reign of George III, by whom they were enlisted in the ranks of the 'King's Friends' for undermining the political predominance of the Whig nobility. Thus, despite the occasional punishment by the House of Commons of an especially flagrant case of corruption, which generally took the form of merging the electorate in the neighbouring district, the sale of boroughs was general and notorious. Indeed, at the election of 1768, it was complained that owing to the competition of the Nabobs the general price of boroughs had risen. Not but that legislative attempts were made, from the time of William III onwards, to check both bribery and the sale of seats; but too many interests were involved to render successful any such attempt; and even a high-minded man like Sir Samuel Romilly justified while he condemned the system, as the only means by which an independent member could obtain a seat. The result was that at the beginning of the eighteenth century, of the 658 members of the House of Commons no less than 487 owed their seats to nomination, of whom 218 in England and Wales alone were returned by eighty-seven peers, and 137 by other individuals of less rank. This system left only a third of the whole House of Commons to be chosen by even the limited constituencies which at that time possessed the franchise. So far, then, as the two bodies of knights of the shire and burgesses could now be said to represent any particular interests, while the former were the nominees of the freeholders, a decently large and independent, but rapidly decreasing body, the members for boroughs could be said on

the whole to represent no one so much as the great Whig aristocracy and their successful rivals.

The attempts to correct this by the introduction of a qualification for members seem to have failed of effect. The early qualification of residence was fortunately not enforced, though, despite the events of 1571, the law remained unrepealed. In 1710, after two unsuccessful attempts, a *property qualification* (4) ^{property ;} was introduced with elaborate safeguards for its enforcement. It consisted of an estate in land which, for the knight of the shire, should be worth £600, and for a Burgess £300 a year. ^{9 Anne. c. 5.} It was however 'systematically evaded,' and was perhaps only maintained so long as it was because the extreme reformers regarded its repeal as so essential that moderate men began to fancy there was some peculiar efficacy in its maintenance. Indeed, it survived the First Reform Act, and in 1838 was only enlarged so as to include a similar value in personal property or in real and personal property combined; nor did it disappear altogether until 1858.

Meanwhile, to the old qualifications, whether of 'belted knights' for the shires, or of residence, or of property differing in amount though not in kind for knights and burgesses alike, had been added, whether as the result of the Reformation or in consequence of the Roman tendencies of the later Stuarts, a number of *oaths and declarations* which have been gradually removed or substitutes found for them. These at first applied to the House of Commons alone. Thus in 1563 the oath of (a) *supremacy* was required to be taken before the Lord High Steward before either knights or burgesses could enter the Parliament-house. To this, in 1610, was added the oath of (b) *allegiance*, administered in the same manner. Hitherto nothing had hindered Roman Catholic peers from maintaining their seats in the House of Lords; but from 1679 this became no longer possible; for these oaths were to be required of both Houses and should be taken at the tables of their respective Houses. And if there had been any doubt in the matter, to these was added a *declaration against transubstantiation*, which was only removed by the Catholic Relief Act of 1829. The circumstances of the Revolution of 1688 led further to the imposition of an oath of (c) *abjuration*, repudiating the claims of the descendants of James II to the throne, which was required

in 1701 and was enforced by penalties in 1714. The *object* of these three oaths accompanied by the declaration was *primarily political* and not religious: 'it does not appear that nonconformists were ever disqualified as such, except in so far as their religious convictions prevented them from taking any form of oath' (Sir W. Anson¹). Roman Catholics were excluded until 1829 by the Act of Supremacy, which was then altered for them, and by the declaration against transubstantiation, which was entirely abolished; Jews were excluded by the oath of abjuration, which ended with the words 'on the true faith of a Christian.' This, however, could be dispensed with by an Act of 1858. Quakers, Moravians and other sects were excluded by their conscientious objection to an oath: an Act of 1833 allowed them to substitute an affirmation. Meanwhile, in 1858, the three oaths of allegiance, supremacy and abjuration had been welded into one; in 1866 the words 'on the true faith of a Christian' were omitted in all cases, and the penalties annexed by the Statute of Charles II were partially removed. The final phase in the matter was due to the conduct of Mr. Bradlaugh in 1880, who, having refused to take the oath and having been adjudged by a Court of Law to be liable thereby to the statutory penalties, then endeavoured to take the oath until forcibly prevented by the House, which considered its forms insulted or at any rate nullified by his conduct. But the result was the Oaths Act of 1888, which allowed under all circumstances an affirmation to be substituted for an oath.

¹ *Law and Custom of Const.*
i. 87.

Disqualifications:
(1) Mental.

§ 27. After the necessary qualifications, refusal to comply with which theoretically at least disqualified an individual for election to Parliament, it is natural to deal with *disqualifications in themselves*. These depended either on Common or on Statute Law, and may be divided into five classes. In the first class may be placed those persons who, whether theoretically or practically, are *mentally* disqualified for responsible business. Under this head come those who are technically called *Infants*, as well as actual imbeciles and *lunatics*. Despite the Common Law, which was confirmed by Statute in the reign of William III, before the First Reform Act it was no uncommon thing for minors to be elected and to sit without protest in the House of Commons. The most notorious instances

were those of Charles James Fox and Lord John Russell. As to those who are really mentally unfit, it is to be remembered that *a member once elected cannot resign his seat*, and that his attendance can be enforced by a call of the House ; but such a method has not been resorted to since 1836, though it was suggested as late as 1882. The only method, other than dissolution of Parliament or expulsion from the House, by which a member can rid himself of his parliamentary duties, is by appointment to the stewardship of the Chiltern Hundreds or of certain old royal manors, which are merely nominal posts, resigned as soon as their object is effected and now granted as a matter of course, although in the eighteenth century it was not uncommon for political reasons to refuse to grant them. The attitude of the House in this matter was the relic of a time when members were glad by any excuse to escape attendance, and when such absence might be a serious impediment to business. Moreover, before the eighteenth century office was not a disqualification, and members could only get exemption by permission of the House itself. Thus the House was inclined to look suspiciously at all pleas of ill health, and would not declare a vacancy unless the malady could be shown to its satisfaction to be incurable. Since 1886 the matter has become subject to legislation ; and continued absence of a member, without any call of the House or other method of compulsion, would meet with its due reward in his rejection on the next occasion when he sought the votes of his constituents.

(Resigna-
tion of a
seat in the
Commons.)

A second set of disqualifications is to be found in connexion (2) Social. with certain *classes* of persons. Thus *Aliens*, though originally allowed to acquire by naturalization the right of sitting in Parliament, were in 1700 disqualified, and remained so, with certain memorable exceptions, until a Statute of 1870 (33 & 34 Vict. c. 14, § 7) placed a naturalized person on the same footing for all purposes as a British subject. Under the same head come *Peers*. As regards English peers no question could arise ; and by an order of the House of Commons made on January 21, 1549, the sons of English peers were made eligible, an important witness to the rising influence of the Commons under the Tudor kings. Scotch peers who are not among the sixteen representatives of that body, are ineligible ; and their eldest sons, who had never sat in the Scotch Parliament,

were equally so until the disability was removed in 1832. Irish peers, on the other hand, who are not among the twenty-eight representatives, are by the Act of Union allowed to sit for any constituency of Great Britain. It has lately been contended that succession to a peerage only renders vacant a seat in the House of Commons if the new peer applies for his writ. It has been pointed out in answer, that 'the Peerage is a *status* involving, among other things, liability to a summons if it be the Queen's pleasure to issue the writ. It is the *status*, not the summons, which causes the disqualification' (Sir W. Anson¹).

¹ *Law and Custom of Const.* i. 246 note.

(3) Official.

² p. 154.

Besides social classes there are certain *official classes* to whom this inability to enter Parliament has been or still is extended. First among these come the *Lawyers*. It has already been noticed how nearly the merchants in the early days of Parliament formed a separate Estate². The lawyers seemed likely at one time to assume a similar position. Edward I patronized the lawyers as much as he courted the merchants, and the possible evil effects of his patronage were only averted by the fact that the Common Law prevented the growth of a legal caste such as the study of the Roman Law encouraged abroad. But further, in the general difficulty of procuring persons willing to be representatives, the House of Commons was flooded by common lawyers, the only class who found a visit to London advantageous for their professional interests. Hence came, on the one side, the extreme jealousy shown by the House of Commons towards the action of the Privy Council and of Chancery alike; hence, also, on the other side, came those complaints of the use to which the lawyers put their parliamentary membership for the furtherance of their own interests, which led in 1372 to a statute, or rather perhaps a parliamentary ordinance, disqualifying lawyers practising in the king's Courts from sitting as knights of the shire. This does not, however, seem to have had the slightest effect. Indeed, when in 1404 Henry IV excluded lawyers by writ from what was consequently known as the 'Unlearned Parliament,' his action met with much adverse criticism, for it was regarded as an interference with the right of free election by the shires.

But the same feeling did not apply to the exclusion of that small band among the lawyers, who had risen to be royal *Judges*.

³ p. 140-1. As we have seen³, they were regarded in a sense as attendants

rather than members of the House of Lords, and as such they would be excluded from the House of Commons by the Common Law. This was further confirmed by a resolution of the House in 1605 on the ground that they were 'attendants as Judges in the Upper House.' To the English Judges were added the Scotch under George II and the Irish under George IV. The holders of newly created judicial posts were disqualified as they were created. The sole exception was the Master of the Rolls, until he too was finally excluded by the Supreme Court of Judicature Act of 1873, which disqualified for a seat in the Commons all Judges of the High Court of Justice or of the Supreme Court of Appeal.

The same ordinance of 1372, which forbade the election of lawyers as knights of the shire, also excluded *Sheriffs* during their term of office from candidature either for the shire or for any borough within it to which their precept extended. Practically, however, the restriction was only interpreted to apply to the shire in which the sheriff was the returning officer, and a later resolution of the House has extended the exclusion to all returning officers in this sense. The wholesale local exclusion of the sheriff has been limited by an Act of 1853, by which writs for the cities and boroughs were no longer to be addressed to the sheriff of the shire in which they were situated.

It seems doubtful whether *Holy Orders* originally rendered their recipient ineligible for membership of the Commons. In 1785 a person in deacon's orders had been admitted by a committee of the House, and the precedents collected by a committee in 1801 have been pronounced inconclusive. We have seen, in the reign of Richard II, the presence of Percy and Haxey who seem to have acted as clerical proctors, but to have been ordinary members of the House, although the latter was certainly in orders of some kind. The question, however, was finally decided in connexion with the election in 1801 of the Rev. J. Horne Tooke as member for Old Sarum. While he was allowed in the doubtful state of the precedents to maintain his seat, it was declared by Statute 'that no person having been ordained to the office of priest or deacon, or being a minister of the Church of Scotland, is capable of being elected' (41 Geo. III, c. 63). To these were added the Roman Catholic clergy by the Catholic Emancipation Act (1829). But finally,

by an Act of 1870, it became possible for any clergyman of the Church of England legally to divest himself of his orders and so to render himself eligible for election to Parliament.

(4) Govern-
mental.

A fourth and important class of disqualifications comes from *connexion with government*, official or otherwise. These may be taken to date from a period just subsequent to the Revolution of 1688, 'when the strength and irresponsibility of the House of Commons made the Crown as anxious to obtain some influence over its members as the House was to exclude persons who held office at pleasure of the Crown' (Sir W. Anson¹).

¹ *Law and Custom of Const.* i. 77; cf. Erskine May, *Const. Hist.* i. 369.

A beginning was made with Commissioners of Stamps (1694) and of Excise (1699), but these were only preliminary to the sweeping clause of the Act of Settlement (1700) by which, after the accession of the House of Hanover, this ineligibility was extended to *any person who held an office or a place of profit under the King*. But this never came into operation; for in 1705-6 it was, with certain important exceptions, repealed. These exceptions form the basis of the law on the subject to the present day. They include (a) the holders of any new office created after October 25, 1705, (b) officers of the army and navy, (c) pensioners of the Crown during pleasure, to whom were added under George I pensioners for terms of years. Another clause provides that even the acceptance of one of the old offices vacates the seat of the member who accepts it, but allows him to seek re-election. This originally useful check upon appointments by the Crown is still retained, although it has sunk into merely 'a needless and vexatious delay in the conduct of public business when a new ministry takes office, or

² *Law and Custom of Const.* i. 80.

a new member is introduced into a ministry' (Sir W. Anson²). The principle of disqualification was steadily continued in the cases of both old and new offices and with a distinction between partial and total disqualification. The chief Statutes affecting *old offices* were the Place Bill of 1742, which affected junior officials of the government offices, and Lord Rockingham's Act of 1782 for the regulation of the civil list expenditure, which abolished several offices connected with the royal household and generally held by members of Parliament. The existence of over a hundred Statutes on the matter renders it hopeless to attempt an exhaustive summary of the *newly created disqualifying offices*. They have, however, been skilfully summarized into

those *connected with the administration of Justice*, such as Judges, Recorders, Registrars, Stipendiary Magistrates; those *representing the Crown*, as Colonial Governors, Court Officials such as were abolished in 1782, or subordinate members of the civil service; those *concerned with the collection of revenue or audit of public accounts*; and those *connected with the administration of property for public objects*, such as Charity and Land Commissioners and Commissioners of Woods and Forests¹. Before passing away from this subject two important exceptions should be noticed. To the old offices existing before October 1705, whose acceptance henceforth subjected their holder to re-election by his constituents, have been added a few others on a like tenure, such as the President of the Local Government Board created in 1871. A more curious case is that of the Under Secretaryships of State, parliamentary and, therefore, political offices changing with the ministry; but which, except in the case of a fifth Under Secretary who would be altogether ineligible, are not regarded as disqualifying their holders from seats in Parliament, because they are not technically considered to be held of the Crown.

¹ Anson,
*Law and
Custom of
Const. i.*
90-92.

Among those connected with government a powerful class was composed of great *contractors*. Their influence, employed for their own benefit and at the public expense, caused their entire disqualification in 1782 with a heavy penalty attached to any violation of the Statute. But the disability was not held to apply to subscribers to government loans; and indeed the most effectual blow dealt to the wasteful methods of raising money employed in the eighteenth century, came from the introduction of a system of close subscriptions which was the germ of the modern form of contracts by sealed tenders. This was largely employed by the younger Pitt, and consists of sealed offers of loans to the government deposited with the Governor of the Bank of England by a specified day, and from among which the Chancellor of the Exchequer selects the most favourable.

The fifth class of disqualifications for parliamentary honours (5) Legal. may be described under the head of convictions for *legal offences*. Such, for example, are *bankrupts* who are members of either House. A member of the Commons in this condition does not forfeit his seat for one year, but he may not, meanwhile, sit or vote unless the disqualification is removed in certain specified

ways. This arrangement was due to two Acts of 1812 and 1869, confirmed by the Bankruptcy Act of 1883. In 1871 a similar disqualification was extended to members of the House of Lords, to whom, during the continuance of their bankruptcy, no writs of summons are issued, although they are not deprived of the privileges of peerage. The disqualification of bankruptcy can only be removed if, among other things, it can be shown not to have been due to misconduct. There are, however, other disqualifying legal offences, which involve a criminal action. Such are *corrupt practices* at parliamentary elections, which were met from time to time by the disfranchisement of the borough concerned. The First Reform Act of 1832 momentarily increased such practices by suppressing the very boroughs which were free from bribery because they contained no voters to bribe. But individual examples had little deterring effect; and from 1841 onwards, numerous legislative attempts were made to check the system. Their frequency (1842, 1852, 1854, 1858, 1868, 1883) bears witness rather perhaps to the magnitude of the stake involved than to the inefficacy of legislation in the matter. As far as the candidate is concerned, a conviction of such practices disqualifies him for ever from sitting for the place where the offence was committed, and for seven years from candidature elsewhere. The illegal and unauthorized act of an agent involves merely the first penalty in a minor degree. More important perhaps, though happily not so general, is the disqualification attached to *any one attainted or adjudged guilty of treason or felony* who has not undergone his term of punishment or received a pardon. In the reign of James I, in the case of *Goodwin* (an outlaw who, in defiance of the king's special writ forbidding the election of bankrupts and outlaws as knights of the shire, had been returned for Buckinghamshire in 1604), the Commons pleaded that even if he were an outlaw, a fact which they disputed, there were precedents for persons of that class as members of the House. The modern form of the question turns on the eligibility of a convicted felon. Such were the cases of *Smith O'Brien* in 1849, of *O'Donovan Rossa* in 1870, of *John Mitchel* in 1875, and of *Michael Davitt* in 1882. In the case of Mitchel, the House of Commons declared him disqualified and the seat therefore vacant; and on the re-election of Mitchel, the law courts not only confirmed the previous judgment of the

Commons, but awarded the seat to his opponent on the ground that the votes given to Mitchel were, under the circumstances, simply thrown away. Until 1870 there seems, however, to have been some doubt, not so much as to the eligibility of felons who had served their sentences, as to the treatment of such persons by the House of Commons. It was always possible that the House would use its power to bring such persons within the list of those who should be expelled for unfitness. Such is its method of action in cases of conviction for a misdemeanour, which forms no legal disqualification and does not therefore vacate a seat. But an Act of that year put it beyond possibility of doubt that convicted felons who had served their term or received a pardon, were legally eligible for seats in the House of Commons.

§ 28. From the members it is natural to turn to their CONSTITUENTS. And here, again, for the sake of clearness it will be well at first to keep the shires and boroughs separate. In both cases equally a great dividing line is made by the changes of the First Reform Act of 1832: but the subject may fearlessly be carried across the dividing line in its two separate halves; for the gain will probably be greater than any corresponding loss from a failure to view our subject as a whole. The history of the *electorate of the shire* falls into three periods. The first of these runs up to 1430 and is full of disputable points: the second brings us to 1832 and shows us an electoral body both simple and certain: the third period has for the present closed with the Representation of the People Act of 1884, and thus traces the growth of the franchise which we now enjoy. The history of the first period is summed up in the answer to the question, *Whom did the Knights of the Shire originally represent?* The choice seems to lie between two theories. It has been maintained, in the first place, by several constitutional writers of authority, that the knights of the shire were the representatives of (1) the minor tenants-in-chief to whom by Magna Carta (§ 14) only a general summons was to be sent; who in consequence largely dropped out of attendance at the Commune Concilium, although some of their number usually responded to the summons; and who were thus brought back by a complete representation to the National Council. Since there is no question that the election of knights of the shire was made

The electorate in the Shires.

(1) Before 1430.

from the first in the full county court, these writers are driven to maintain that tenants-in-chief were alone suitors of the court through which the election was carried out, or as they phrase it, that the election was made at the court baron of the shire and not at the court leet at which all resident freeholders were obliged to attend¹. As against this view it has been contended, and is now generally accepted, that the knights were the representatives of (2) *the community of the shire as organized in the county court*. It has been pointed out by Dr. Stubbs that, if the former theory is correct, 'the assembly by which the election was made would not be the full county court; the electors would be the tenants-in-chief, not the whole body of suitors; and the new system, instead of being an expedient by which the co-operation of all elements of the people might be secured for common objects, would simply place the power of legislation and taxation in the hands of a body constituted on the principle of tenure²'. The question practically turns on the *composition of the shire court* at the time of the first election of knights to a national assembly. And here we are met on the very threshold of our inquiry by the theory presented to us tentatively by Professor Maitland³, and more uncompromisingly by Mr. Round⁴, that freeholders as such were not members of the county court. This will be mentioned in detail in another connexion. For our present purpose the insufficiency of the evidence compels us to put aside the hypothesis; although, if it is ever thoroughly substantiated, its effect on the future reading of our history can scarcely be overrated. So far as the interpretation of the usually accepted evidence takes us, the shire courts consisted of others than (1) merely tenants-in-chief. The order issued by Henry I for the holding of the local courts 'as in the time of King Edward' the Confessor, speaks of the decision in the shire court of disputes between *vavassores* of two lords⁵, i.e. feudal subtenants, a class who are also included by the Laws of Henry I⁶ among the constituent elements of the county court. Evidence on this point multiplies as we proceed in time⁷. In the second year of Henry III a writ addressed to the sheriff of Yorkshire commands him to publish the Charter 'in pleno comitatu, convocatis baronibus, militibus et omnibus libere tenentibus ejusdem comitatus.' Under Edward I the Hundred Rolls

¹ *Lords Rep. on Dig. of Peer*, i. 149.

The members of the Shire Court.

² *Const. Hist.* ii. § 216.

³ *Eng. Hist. Rev.* vol. iii.

⁴ *Arch. Rev.* ii. 66.

⁵ *Sel. Chart.* p. 104.

⁶ *Ibid.*, p. 105, vii. 2.

⁷ *Cf. Edinb. Rev.* vol. xxvi.

give numerous instances of subtenants who owed suit and service, i.e. attendance in the local courts. These Rolls, however, form some of the most important evidence in the contentions of Professor Maitland and Mr. Round. Again, it may be urged that the first of our two theories runs directly counter to (2) the avowed policy of the Plantagenet kings, whose object was by every means to get rid of feudal claims; while it is to be remembered that knights were elected for numerous local purposes in the county courts long before they were called upon to attend a National Council. But finally, and perhaps most conclusively of all, (3) the writs for the election of knights of the shire speak as plainly as words can witness to the participation of the whole shire court. The sheriffs are directed in these writs to return two knights to Parliament who have been chosen 'in pleno comitatu, de assensu ejusdem comitatus, assensu et arbitrio hominum ejusdem comitatus.' There is no further need to labour at the point. The upholders of the first theory account for the position occupied by the knights of the shire in the fifteenth century, by supposing that in the general confusion of tenure which accompanied and bore witness to the decay of the feudal system, feudal subtenants introduced themselves as members of the county courts, and that the right of others than tenants-in-chief to take part in the election was first established by an Act of 1406.

It is most probable that we can trace a change during the period with which we are dealing, in the constituents of the county court; but it is in a direction exactly opposite to that just indicated. Thus, at first, the election seems to have been made by the qualified constituents of the county court, practically the freeholders of the shire. But it must have taken place in the ordinary monthly, or as it came to be, three-weekly court; for only forty days were allowed between the issue of the writ and the meeting of the Parliament. Now this court was attended only by those who had special business either as jury, in which case they would be freeholders, or as parties to a suit. All the more influential members, and with them apparently some of the smaller freeholders, were exempted from attendance unless specially summoned either to meet the king's justices or for the transaction of important kinds of business. Of the power placed in the sheriff's hands by this arrangement

Change in
members of
Shire
Court.

something will presently be said. For the present it is to be noticed that the court seems to have been flooded with persons of less importance than the proper constituents, and that by the end of Edward III's reign such persons took part in the election. The *plenus comitatus* had in fact changed its character, and this was recognized by the first Statute, passed in 1406 (7 Henry IV, c. 15), for the regulation of elections of knights of the shire; for by this it was enacted, among other things, 'that all they that be there present (i. e. in the county court), *as well suitors duly summoned for the same cause as others*, shall attend to the election of knights for the Parliament.' To this two riders were shortly added; for a Statute of 1413 enjoined that the electors as well as the members, should be resident in the shires and boroughs for which they voted and sat respectively; while another of 1432 stipulated that, in the case of shire elections, the land which gave the vote should be situate in the county.

Legislative
limitation
of electors
and can-
didates.

These last were limiting statutes, and it was in the direction of limitation both for members and voters, for shires and boroughs alike, that the tide of legislation and royal predilection set. Already, in 1376, the 'Good Parliament,' following the example of its predecessor of 1372 which had successfully demanded the exclusion of sheriffs and lawyers as members, sought to restrict the electorate in the shires, and so the power of the sheriffs, by a petition that knights of the shire might be chosen by common election of *the better folk* of the shires. To this the king replied that they should be elected by common assent of the whole county. It was perhaps the power placed in the hands of the sheriff, and the fear, if not the actual occurrence, of riotous elections through the unwieldy and irresponsible character of the electoral bodies, which led to a change of tone on the part of the king and his advisers. Whatever the reason, the liberal provisions of 1406 were withdrawn by the celebrated Statute of 1430 (8 Henry VI, c. 7), 'the first disfranchising Statute on record,' which even went back upon the original constituents of the county court and narrowed the qualification of electors for knights of the shire not only to freeholders, but to such only as possessed land of the clear annual value of forty shillings. The same Statute reaffirmed the condition of residence enacted in 1413; and it was followed two years later by the Act, already quoted, which coupled

with residence the property in respect of which the vote was given.

Thus the county franchise remained for just four hundred ⁽²⁾ years most unfortunate in its exclusion not only probably of ^{tween 1430} a considerable number of the smaller freeholders—for forty ^{and 1832.} shillings represented a substantial sum which has been estimated at between £30 and £40 of present value—but also of that more important class of emancipated villans and their representatives, who held their land on copyhold or leasehold tenure often to a considerable amount, and who were quite capable of the responsibility of the vote. The effect was the same in kind as, though different in degree from that which would have been produced had the original electorate consisted merely of tenants-in-chief. The development in the electoral body up to 1430 and its entire stagnation afterwards is an additional argument in favour of the more liberal constitution of the original shire court. But although a great political injustice was committed by this exclusion from representation of a large and increasing number of those interested in land, it must be recognized that on the whole the small class of freeholders, who alone exercised those political rights, were worthy of the trust which was for so long concentrated on them. There has already been occasion to notice the manner in which early writers spoke of the yeomen, whether small freeholders or substantial tenants'. Even amongst the general ^{p. 40.} disappearance of small properties which marked, with other things, the political influence of the aristocracy after the Revolution of 1688, statesmen still pointed to the county constituencies, the forty-shilling freeholders, as the most uncorrupt part of the constitution. 'They represented,' it has been said, 'public opinion more faithfully than other electoral bodies; and on many occasions had great weight in advancing a popular cause' (Sir T. Erskine May²). Thus, despite the great and, in many ² *Const. Hist.* i. cases, overwhelming influence of the nobility, the more moderate ^{353.} among the early schemes of parliamentary reform—those connected with the names of Chatham, Wilkes, and the younger Pitt—suggested the disfranchisement of boroughs and the addition of the seats so gained to the representation of the counties.

The third period in the history of the county electoral bodies ⁽³⁾ Since ^{1832.} is ushered in by the Reform Act of 1832. By that Act, to the

Qualifica-
tions of
property,

old property qualification of a forty-shilling freehold (which was itself as a qualification restricted to occupation and to acquisition by methods other than purchase, such as inheritance and marriage-settlement), were now added four other *property and non-residential* qualifications—a freehold for life, however acquired, of the annual value of £10; copyhold or other land of the same value; and two sorts of leasehold, viz. of £10 value for sixty years, and of £50 value for twenty years. The only change made in these qualifications by the *Act of 1867* was a reduction of the value of the freehold for life from £10 to £5. The *Act of 1884* followed suit with the copyhold and leasehold, reducing the former and the first of the leasehold qualifications similarly from £10 to £5. Thus, besides the old forty-shilling freehold narrowed and defined, and a leasehold of £50 for twenty years, all other property qualifications are by the present law reduced to an uniform rate of £5 value.

of occu-
pation.

But, besides adding to the property qualifications, the *Act of 1832* introduced into the county constituencies an entirely new qualification based upon *occupation*. The right of voting for members of Parliament was given to the 'tenant of any lands or tenements for which he should be liable to the clear yearly rent of £50.' This was known from its introducer as the 'Chandos' clause, and probably effected its purpose of strengthening the interests of the landlords. In addition to this high *rental* value, the *Act of 1867* created another qualification arising from occupation of any land or tenement of the *rateable* value of £12. For these two qualifications the *Act of 1884* substituted an uniform value of £10, applicable to all parts of the United Kingdom and to counties and boroughs alike, but differing in each portion of the Kingdom in details of assessment of value, residence, and requisite payment of taxes. Finally, this last Act added a third qualification to the county constituencies, that of *residence*, which had been created in the boroughs by the *Act of 1867* and was now merely extended, both in the case of inhabitant occupiers of a house occupied and rated as a separate dwelling, and in the case of lodgers who have resided for a year in lodgings of the clear annual value, if let unfurnished, of £10.

§ 29. Such has been the course of the changes in the *personnel* of those on whom our Constitution has at various

times bestowed the privilege of exercising the franchise in the shires. We turn to the more intricate subject of the *constitutions of the boroughs*. There is a difficult preliminary question as regards the actual boroughs which were entitled to send members to Parliament. It has been maintained by those constitutional writers who, in their insistence on the all-importance of tenure, have wished to limit the county constituencies to the tenants-in-chief, that the towns were summoned to send representatives as being in ancient demesne of the Crown¹. It was on the strength of this view that some of the towns in the early days of Parliament tried to escape the burden of representation by asserting that they were not in ancient demesne. The contention amounted to a view that it was as landlord, and not as national sovereign, that the king had summoned burgesses to his councils. The claim, however, had little ground historically, and was disallowed. The long exemption of the Counties Palatine of Chester and Durham shows the respect paid to old anomalies; but the early representation of the Palatinate of Lancaster prevents any conclusion from these exceptional cases. As to the general question, there seems no doubt whatever that from the very first occasions when burgesses were brought to the National Councils, they came as representatives of wealthy portions of the country which deserved especial consideration. For, in the *first* place, the writs summoning representatives of the towns were directed to the sheriffs of each shire, with whom thereby lay the choice of the towns which should be so represented. The acts of Simon de Montfort in 1265², and of Edward I in 1283³, in directing the writs to the mayor or bailiff of each individual town, were regarded as anomalous and were not followed by later conveners of the national assembly. In general the sheriff is directed to return *de qualibet civitate . . . comitatus duos cives et de quolibet burgo duos burgenses*, and not a word is said of demesne; but as if to guard against any possible misunderstanding, the royal writ for the collection of the money granted in 1296 explicitly states that it was made by an assembly which included *homines de civitatibus et burgis nostris, de quorumcunque tenuris aut libertatibus fuerint et de omnibus dominicis nostris*⁴. Again, the definite distinction and yet amalgamation in the assembly of these two kinds of towns is illustrated by the

The electorate in the boroughs.

¹ Cf. *Edinb. Rev.* vol. xxxv.

Theory of borough representation.

² *Sel. Chart.* p. 415.

³ *Ibid.* p. 468.

⁴ Palgrave's *Parl. Writs*, i. 51.

¹ Stubbs,
Const.
Hist. § 218
note, and
Parl.
Writs. i.
34-45.

lists of boroughs which were represented in the early Parliament. From these we find many instances of boroughs, such as Salisbury which belonged to the bishop, and St. Alban's owned by the abbot, which sent members although they were certainly not in ancient demesne of the Crown¹; while, on the other hand, there were many answering to that description which either (like Pevensay, never, or (like Grantham) not till a much later period, were represented in the House of Commons. In conclusion of this point it may be remarked that a representation of towns in ancient demesne would be as contrary to the policy of the Plantagenet sovereigns as a recall of the lesser tenants-in-chief to the National Council in the persons of the knights of the shire. The whole tendency of the royal policy was in favour of national claims as opposed to those based, like the qualifications of knights of the shire from the lesser tenants-in-chief, and of the burgesses from ancient demesne, on merely feudal considerations.

The burdensomeness of representation.

We are now in the position to investigate the constituency of any particular borough. Unfortunately there is far greater difficulty than in the analogous case of the knights of the shire, in determining the question *Who elected the members for the boroughs?* The burdensomeness of early representation is realized most clearly from the action of the towns in connexion with their appearance in Parliament. For those towns which were represented were liable to special wages to their members and a higher rate of taxation than that imposed upon the inhabitants of the counties. The result was that the towns tried in every way to escape their obligations. There has just been occasion to notice the use made for this purpose of the theory of ancient demesne. Other methods will be mentioned in connexion with the influence of the sheriff². For the present it need only be said that so great was this unwillingness that it became necessary to appoint *manuaptors or bailsmen*, whose duty it was to see that the elected members presented themselves wherever the king had appointed that Parliament should be held, and who were themselves actually provided with power of attorney to act for an absent member. It will be remembered how chary the Commons were in accepting the excuses of a member's absence³, and also how, in the case of London, these

² p. 183.

³ p. 159.

manuaptors after a time took their place alongside of the original members, who were thus doubled in number¹. But¹ p. 148. in 1406 the law of Henry IV, while it legally popularized the county electorate, at the same time required that those making the election should affix their names and their seals to an indenture or writing which should be joined on to and returned with the writ; and this precaution, although imperfectly complied with, seems at the same time to have checked the sheriff and to have minimized the necessity of manuaptors.

But so long as representation remained a burden, there were no disputed elections; the difficulty rather was to procure persons willing to be elected, and thus the question of the exercise of the franchise did not for some time become a matter of dispute. When it did arise as the result of the increasing influence of Parliament under the Tudors, it was settled in a variety of ways, all of which, however, concurred in restricting the privilege of the vote according to the custom at municipal elections, or as a consequence of the temporary weakness or strength of the governing body of the town. The process was begun and rendered simple by (1) the increasing grant of charters of incorporation. The early charters had conferred new privileges leading gradually up to entire self-government, which was generally concentrated in the hands of the merchant gild or some already definitely organized local body. From the time of Henry VI onwards such charters had for their object the definition of the mutual rights and relations of the townsmen and the organization of corporate bodies for their rule. Among the duties or privileges imposed upon or granted to the corporation was not infrequently the exclusive right of electing the parliamentary representatives of the borough. And in cases where it was not definitely conferred by the charter, the right was often assumed by the governing body of the town, who rested their claim in some way on an interpretation of the charter and fortified it by (2) the favourable result of a decision by one or other of the various committees of the House of Commons which, from 1604 onwards, tried cases of disputed elections. These decisions, indeed, were grounded, after the rise of parties in Parliament, purely upon political considerations. Sir Robert Walpole, in 1742, accepted the defeat of the candidate whose cause he was advocating

Influences which narrowed the borough constituencies.

¹ Anson,
*Law and
Custom of
Const.*
i. 103.

Qualifica-
tions for
borough
constituen-
cies before
the Reform
Act.

² Stubbs,
*Const.
Hist.* § 422
end.

in the Chippenham election petition, as evidence that he had lost his command of the majority in the House, and resigned. And such decisions of the Commons were of importance because 'when once they had declared an election to be invalid on the ground that the votes of a particular class of voters had been accepted or rejected, the right of that class was settled and the custom of the borough fixed'.¹ This must especially have been the case after a Statute of 1729 had ordained that the last determination in the House of Commons should definitely settle the claim to a vote. And the decisions of the Commons must have been largely influenced by (3) the existence of that numerous and, down to the reign of Charles II, ever-increasing type of boroughs which were never intended to represent anything but the royal power in the House, and in which, therefore, from the very first the franchise was of the most restricted kind.

The result of these influences will be apparent in a classification of the chief *qualifications* on which, prior to the First Reform Act of 1832, the right to a vote within the towns was based. Of such there were roughly four, which have been marked off as Tenure, Residence, Incorporation and Corporate Office. The qualification of (a) *tenure*, which was probably the oldest, was of two kinds. The most common form was that of burgage tenure, which 'was exactly analogous in origin to the freeholder's qualification in the counties',² and a common form of burgage tenure connected it, as at Richmond, with the holding of certain houses, probably in theory those which had contributed to the ancient *firma burgi*. A second form of the tenure qualification was peculiar to those large towns which enjoyed the status of a county, and apparently to some others; and, as in the counties, the franchise was vested in the forty-shilling freeholders. These need not, however, have been very numerous: in Tavistock there were ten; in Gatton the freeholders together with the next class of voters amounted jointly to seven in number. There were, besides, a few quite anomalous electoral bodies whose rights were based on tenure. Thus in Cricklade, which was disfranchised in 1782, to the freeholders were added copyholders of lands within the borough, and even leaseholders for a term of three or more years. The qualification of (b) *residence* in almost all

cases took the necessary form of the payment of 'scot and lot,' that is, a share in the contributions levied from the town for local or national purposes. It was almost a necessity that the voter should be a householder, though exceptions are found. A peculiar case of this qualification of residence is found in the 'pot-wallers' of Taunton who are defined as householders or lodgers furnishing their own diet, in proof of which they boil their own pot in the streets to this day. Finally, it should be remarked that this qualification of residence for voters was in the early days of parliamentary representation not only regarded as a matter of course, for 'non-residence,' in the words of a recent writer, 'was not contemplated',¹ but that the Act of 1413, already quoted, actually

¹ Anson,
*Law and
Custom of
Const.*
i. 97.

required it in the case of electors as well as of members; nor was the Act repealed until 1774. With the third qualification, that of (c) *incorporation*, we reach the chief agency in the narrowing of the borough electorates. The early charters to boroughs not infrequently, especially in the case of trading towns, placed their government in the hands of the freemen of the local merchant gild. Such freedom could, in process of time, be acquired in various ways different in almost each individual town, and have been summarized as birth, marriage with the daughter or widow of a freeman, apprenticeship or servitude, purchase, or even gift. (Sir W. Anson².) The chief evils² of this tenure, if it is possible to select in a case where the whole system was so baseless in reason and corrupt in action, were that, firstly, together with the rights the freeman did not necessarily incur liabilities such as tenure, residence or payment of local taxes; and secondly, in many cases the Corporation had the power of conferring freedom at its pleasure, and used its licence to create freemen for the purpose of carrying parliamentary elections. These were the 'fagot' or manufactured votes which were untouched in the boroughs until 1832, although in the analogous case of specially created forty-shilling freehold in the counties, a legislative attempt was made to check the manufacture both under William III and under Anne. The last qualification, that of (d) *Corporate Office*, was entirely the creation of Tudor charters, often fortified by interested resolutions of the oligarchical House of Commons in the eighteenth century. For the inhabitants did not in all cases

² *Ibid.*
p. 101.

tamely acquiesce in an interpretation of the charter, which left them at the mercy of a self-elected governing body. But the prevailing influences, as we have seen, were wholly in the direction of restricting the electoral body, and in many instances the continued apathy of the electors permitted of and actually encouraged the direct nomination of the members by the lord of the manor or some local magnate.

Hindrances
to freedom
of borough
elections.

It will now be possible to appreciate the full strength of those influences which co-operated to make the representation of the boroughs the pretence which it became in the three centuries preceding the Reform Bill. Allusion has already been made to the opportunity, which the narrow and even vanishing constituencies gave, either for (i) simple *nomination* of their members, or for the (ii) influence of the voters by *direct bribes*. But there still remained a few towns where the electoral body, being constructed on a liberal basis, was too numerous to be dealt with in either of these methods. In many such, especially seaport and trading places, it was possible to secure the election of candidates of the government by the (iii) *multiplication of revenue officers* to a number greater than that of the free constituency. The ministry of Lord North was said to have created no less than 12,000 of these officers, whose entire number was further calculated at a figure between 40,000 and 60,000 out of an entire electorate of 300,000 persons. Although it is a bad precedent to disqualify any particular class of men from the exercise of their rights of citizenship, and although such disfranchisement was perhaps the most serious blow that could have been inflicted on government influence at elections, yet a gradually accumulating public opinion imperatively demanded the sacrifice; and from 1768 onwards, bills for the purpose were continually introduced until the measure was finally accomplished by Lord Rockingham's Act of 1782, which removed from the electorate all officers connected with the collection of customs and excise. The concession of a popular franchise throughout the country made it safe to restore the right in 1868 to those from whom, on Burke's bold principle of the occasional purifying effect of disfranchisement, it had been so justly taken. There were a few great cities also where the electorate was too numerous to be overborne even by the wholesale creation of government

votes. But in these the popular candidate, even if successful, was (iv) ruined by the *expenses of a contest in which the poll was kept open for forty days* with the necessary accompaniments of feasting, intimidation, and continual disorder. The first limitation to this system resulted from the scandals connected with the Westminster election in 1784. At the election which confirmed George III's arbitrary dismissal of the Coalition Ministry, Charles James Fox was returned for Westminster by a majority of 236 over the Court candidate. But the High Bailiff, who was the returning officer, withheld his return and began a scrutiny into the votes, thus restraining the successful candidate from taking his seat in Parliament. Fox was returned for another constituency; but for a long time the High Bailiff's conduct was defended by Pitt's majority, who refused to order him to make an immediate return. The iniquity of the whole proceeding at length brought the House of Commons not only to refuse to uphold Pitt in his 'ungenerous conduct,' but to seek a remedy by an enactment of 1785 (23 Geo. III, c. 84) which limited the poll to fifteen days and closed a scrutiny six days before the day fixed for the meeting of Parliament. In 1853 the poll was further reduced to a single day, and the writs for borough elections were to be directed to the returning officers of boroughs, instead of to the sheriff of the county, as hitherto; and finally in 1872, by the Ballot Act, a movement of some standing in favour of secret voting obtained legal recognition. Elections both in counties and boroughs were regulated in further details by subsequent legislation, which may be gleaned from any modern manual of election law.

Meanwhile, it is necessary to return to the *changes wrought in the borough constituencies by the three Reform Acts* of the present century. The Reform Act of 1832, while preserving all individual vested rights of the existing electorate, made a clean sweep of the old anomalous franchises with an exception in favour of the freemen of such chartered towns as had hitherto exercised the right. Yet even in these cases, the modes of acquiring freedom were limited to birth and servitude, with the added qualification of residence in or within seven miles of the borough. With these restrictions the privilege of freemen has survived the reforming fervour of 1867 and 1884. The new qualification introduced by the Bill in the place of those

abolished was an uniform franchise based upon *occupation* of premises of the annual value of £10. To this single qualification the *Act of 1867* added for the boroughs one based upon *residence*, whether in the shape of a household franchise conditional on payment of rates or of a lodger franchise for unfurnished rooms of the annual value of £10. These qualifications are untouched, except in details, by the *Act of 1884*, whose great work it was, as we have already seen, to extend the qualification of residence to the counties and thereby finally to assimilate the county and borough franchise.

Outside
influences
upon
Parlia-
ment.

§ 30. It will have been abundantly plain from the foregoing account that, however clearly Parliament may at times have expressed the prevailing opinion of the country, it was not until 1832 that it could exercise any steady pressure in favour of a policy acceptable to the people at large, in opposition to the wishes either of the king or of the narrow class which had acquired the franchise. From its very earliest existence, however, there were influences at work, which alone, through the maintenance of the symbols and language of popular government, prevented Parliament from becoming the sporting ground of a selfish oligarchy. Thus, while in theory elections were free, the voice of the country was expressed by a small minority of the people and was constantly overborne by the interests of some few great individuals or of the Crown. Again, the speeches and votes of individual members were, by the theory of the constitution, free from outside influence; but in practice they were made and given at the bidding of a few influential persons who had it in their power to make or blast the reputation and the fortunes of the ambitious politician. Circumstances, of which many have already been detailed, kept apart the theory and practice of parliamentary government for five hundred years. It is important to examine the working of those influences which, from the first arrangement of the constituent elements of Parliament into the two Houses of Lords and Commons down to the eighteenth century, brought about so effectual a separation. It will then be possible to estimate the measures which, during the last century and a quarter, have been either carried out or suggested for realizing the harmony between Parliament and the people whom, in theory at least, it has never ceased to represent.

The earliest and, considering its importance, the most short-

lived of sinister influences on elections to the Commons seems to have been that exercised by the SHERIFF. The writs for the elections were, with the two noteworthy exceptions of 1265 and 1283, and until 1853, addressed to the sheriff of each shire, enjoining on him to procure the election of two knights for his shire and two citizens or burgesses for every city or borough within the limits of his shire. The whole conduct of the election, therefore, lay in the hands of the sheriff, whose sinister designs, where he entertained them, would be rendered comparatively easy by the *extreme unwillingness of persons to become candidates for Parliament*. The reasons of this reluctance are not far to seek. The summons to Parliament was equivalent to a demand for the grant of taxes; and every one would be unwilling to face the reproaches of his neighbours for what might be considered undue compliance with the royal demands. And when to this opportunity of incurring popular odium were added the unknown terrors of a distant journey and the inconvenience of absence from a farm or a business, it can be well understood why, in the words of Dr. Stubbs, 'the office of representative was not coveted, and we can imagine cases in which the sheriff would have to nominate and compel the service of an unwilling member'.¹ Nor were the *constituencies* any more eager to be represented; though the different situation of the shires and the boroughs caused the attempts at escape to take a slightly different shape. For the members were entitled for their services to *wages* at the rate of four shillings a day for the knights, and two shillings for the burgesses during the parliamentary session, and to a sum for journey money of an amount which was usually fixed in the assembly which elected them. The rate of wages became a settled custom as early as the reign of Edward II, and were collected by the sheriff from all those entitled to vote, in satisfaction of royal writs *de expensis levandis* which were issued to the members on the last day of the session. The right, then, to the receipt of wages rested on the Common Law, and the fixed sum, though usual, does not seem to have been compulsory. At any rate, although in the case of some few large towns, such as London in 1296 and York in 1483, an increase of wages was sometimes promised, there are other instances, as at Cambridge in 1427, where the constituents

Influence
of the
Sheriff.

Reasons
for its
exercise.

(Desire to
escape re-
presenta-
tion.)

¹ Const.
Hist. § 217.

bargained with their members to take less. But under Henry VIII the usual rate was made a matter of legislative grant in the case of the newly enfranchised shires and boroughs of Monmouth and Wales (35 Henry VIII, c. 11). It was not long, however, before electors took advantage of the increased importance of a seat in Parliament to agree with candidates at elections that they would serve for nothing. The custom, therefore, gradually died away, although in isolated cases payment was demanded and obtained. The last known instance is in 1681, when the Chancellor, Lord Nottingham, gave judgment in favour of a member for Harwich who sued his constituents for his wages. Thus the payment of members is a lapsed constitutional right; and when it was moved in the House of Commons in 1870 'to restore the ancient constitutional practice of payment of members,' whatever we may think of its wisdom, the form of the motion was strictly correct.

It has just been said that the inhabitants of the shires and boroughs alike desired to escape representation and all its liabilities, but on different grounds. In the case of the *shires* there was no question of the escape of the whole community from the necessity of making an election. The number of the shires had been fixed long before there was any thought of representation in Parliament; and although certain shires might and did put off the duty of sending members till a comparatively late period, there was no question of the liability of those which had once received the writs. Hence the claim of exemption in the shires came in the shape of

(Method of escaping representation in the Shires.) the *refusal of certain classes to contribute to the wages of the members* on the plea that they were not entitled to take part in the election. There were three such classes—(a) *mesne or feudal subtenants*, on the plea that the knights were supposed to represent the tenants-in-chief alone, a theory which has already been shown to have no historical foundation apart

¹ p. 165. from the interest of those who urged it¹; (b) *tenants in ancient demesne* of the Crown, to whom, on the ground that the king still had the power of taking tallage without leave of Parliament, it seems to have been occasionally allowed; and (c) the *socage tenants* of the county of Kent, who ultimately obtained their exemption. For, when the Commons attempted to counteract such demands by a petition that the expenses should be levied

from all the 'communitates' of the shire, the Crown usually answered by a decision in favour of the local custom. It was this spirit which animated Edward III in his answer to the petition of the Good Parliament in 1376, that the knights of the shire might be chosen by common election of the better folk of the shire and not merely nominated by the sheriff.

But such a petition discloses the extent of the mischief already at work; for the unwillingness alike of candidates and electors, together with the relaxation of the duty which originally lay on all the greater as well as the lesser landholders of the shire to attend the local courts unless especially summoned, made *the sheriff practically master of the situation*. He seems to have *used his power in three different ways*, each of which was ultimately checked by legislation. Thus (a) he would *summon no one especially* for the election or restrict the notice to a few friends whom he could trust. This was aimed at by a Statute of 1406 (7 Henry IV, c. 15), which, while directing that the election should take place 'at the next county court to be holden after the delivery of the writ,' and should be made by all who were present, whether specially summoned or no, required that the signatures and seals of the electors should be placed upon the indenture or writing which always bore the names of the elected members and was joined on to and returned with the writ. Moreover, these were no longer to go, as heretofore, to Parliament itself, but into the royal Chancery whence the writs were issued. But the provision as to signatures and seals could never have been complied with; for the indentures that have been preserved contain in no case more than forty names, which were probably those of the persons to whom special summonses had been issued or who had seals to affix, acting as a kind of committee for the rest of the electors. Occasionally, perhaps, it was a mere trick on the part of the sheriff and his friends whereby they complied with the Statute without letting go of the power. And this seems borne out by the fact that the returns of the borough members are often found signed and sealed with the same names as those of the knights of the shire.

A second method employed by the sheriff for the return of his own nominees was (b) *to deliberately substitute other names* in the returns for those of the persons who had been properly

Methods of
its exercise
upon the
Shires.

elected. This could only be met by a petition to the king, the Council or Parliament itself, from a number of those who had made the election. Thus, as a strong though indirect testimony to such action on the part of the sheriff may be cited the circumstances of the Huntingdonshire election in 1450. The indenture remains with the names of five persons attached, together with a letter signed by 124 freeholders who, fearing that the sheriff intended to make a false return, sent a memorial in which they stated that they, together with more than 300 good commoners of the shire, had voted for two certain persons. In this special instance no trick had been attempted; but the terms of the memorial are as striking an illustration as any direct instance of such use of the sheriff's power. But the sheriff had still another method of action; for, taking advantage of the heterogeneous character of the court and the abstention of all members of importance, he would (*c*) *force through his own candidate* by the appearance of compliance with the necessary forms. For some considerable period the election was made merely by a show of hands, and it was not difficult in a crowded and tumultuous assembly to make the decision go in the way required.

Attempts
to check it.

Legislative attempts to check returns made through these means took two forms. In the first place, the action of the sheriff was subjected to *supervision*. In 1610 it was enacted that the Judges of Assize should inquire into any wrongly made returns, and the sheriff, if convicted of breach of the law, was liable to a fine of £100; while the members unduly returned forfeited their wages. The second method of curtailing the sheriff's power in this matter was by *limitations on the qualifications* both of electors and of candidates. Thus, by a Statute of 1413 the knights must reside within the shire for which they were elected; while a law of 1445 restricted the persons chosen to the class of knights or esquires. In the case of the electors, the law of 1413 required that the electors should also be residents; while in 1432 the land in respect of which they voted must be situated in the shire for which they gave their vote. Two years before had been enacted the important statute which limited the electorate to the forty shilling freeholders. It does not, however, seem to have had any effect on the class of persons either electing or elected, though doubtless it did much to check the

particular methods of the sheriff's action which had helped to call it forth. Nay further, the sheriff must have occasionally found formidable rivals in the small oligarchy of the country gentry, to whose influence in elections the small numbers of names affixed to the indentures may be a witness, or in the overpowering interference of some great local noble. Certainly in the fifteenth century the local government, or rather means of control, was almost entirely in the hands of the great nobility, who either through corruption or intimidation returned their candidates to Parliament, and procured immunity from justice for their own lawless followers. Before such a storm the sheriffs must have bent their heads. A long period during which Parliament was almost in abeyance, must have given little need for their services in superintending the elections, and when next we find them taking an active part in the matter, the great nobles are crushed and the sheriffs are exercising their influence in asserting the interests of the Crown.

The connexion of the sheriff with the *borough* elections calls for separate treatment. The unwillingness of the boroughs to be separately represented in Parliament came from the fact that such representation involved the payment of special wages though at a lower rate than those given to the knights; and contribution to the tenth-and-fifteenth at a slightly higher proportion than that exacted from the inhabitants of the shires. Thus from the shires was demanded one-fifteenth or an income tax of 1s. 4d. in the pound, while the boroughs were called upon to pay one-tenth or 2s. in the pound. It is no wonder, then, that the towns tried to escape the liability in every way. The plea put out by some few that they were *not in ancient demesne* was, as we have seen¹, promptly quashed. It was not easy, though it was not unknown, to get emancipation by *charter from the Crown*. A simpler method was to come to an *understanding with the sheriff* whereby a town dropped out of representation altogether. Thus it came about that many important towns, such as Birmingham and Leeds, had no representation until 1832, although they were both corporate bodies in the fourteenth century.

Influence
of the
sheriff
upon the
boroughs.

(Methods
of escaping
representa-
tion in the
boroughs.)
¹ p. 171.

The method of election itself placed an enormous power in the hands of the sheriff. The writs for the election of burgesses were addressed to him, and left in his hands entirely

Methods of
its exercise.

the choice of the boroughs which should be represented; for he was supposed to communicate the writs to such towns in his shire as by reason of their wealth and position as corporate bodies were worthy of this extra consideration, and to add his own 'precept' or notice to elect. Now, the sheriff might *omit to send his precept* to a borough. Such an omission was aimed at by a Statute of 1382 which forbade the sheriff to omit any city or borough which had been wont to send members, and, as we have seen¹, it arrested the downward progress in point of numbers of the boroughs represented. But, notwithstanding this, it was found necessary by the Act of 1445 to threaten penalties to the sheriff or the mayor to whose fault the non-arrival of representatives from a borough might be due. But if the sheriff's precept was sent and complied with, the election would take place under the conduct of the borough magistrates to whom the precept would be addressed. Thus the actual election would ordinarily be made in the borough court, and the names of the members chosen would be announced to the shire court by the messengers or deputies of the magistrates. Finally, the names of all the representatives from the cities and boroughs which had responded to the sheriff's precept, were placed upon the writ together with the names of the two knights of the shire, and the writ was returned to be verified in Parliament itself or, after 1406, by Chancery. Technically, then, the election of burgesses seems also to have been carried out in the shire court, and the sheriff had an even better chance than in the case of the shire members, of *interpolating in the writs the names of others* than those of the candidates actually elected. The reality of this evil appears in a petition of 1384 from the burghers of Shaftesbury, who demand of Parliament a remedy for the sheriff's action. A more general testimony to the prevalence of this trick is a petition presented by the House of Commons to the king in 1436 against the interference of the sheriff in borough elections, especially in the matter of returning the names of members not elected.

Attempts
to check it.

Some slight *check* must have been exercised upon the sheriff's power of choice by the application to the boroughs of the qualification of *residence* for their representatives (1413), a provision which seems at first to have been generally and rigorously enforced, and only evaded when a seat in Parliament

became a post of honour, by the admission of the candidate to the free burghership of the town which he sought to represent. Another check must have been the extension to the boroughs in 1444 (23 Henry VI, c. 15) of the law of 1406, which required that *the electors should add their names and seals* in an indenture which should be tacked to the writ. But it must have been the *new charters of incorporation* which dealt an effectual blow at all outside influence for the time by concentrating the franchise or duty of election in the hands of a small and select body, which at the first seemed to have guarded their new privilege with much care. The conduct of the borough of Westbury is an isolated instance; and the creation of 'rotten boroughs' by the Tudors is as much a testimony to the integrity of the new electoral bodies in the boroughs as it is a proof that the Crown did not need to try conclusions with the older and long established municipalities which sent members to Parliament.

§ 31. If the influence of the sheriff waned, that of the Influence of the Crown. CROWN increased and absorbed any powers that remained to the sheriff in the matter of parliamentary elections. For the *action of the Crown upon Parliament* was by no means confined to the manipulation of elections. It generally began before the elections were held and continued throughout the whole session. But the methods employed by the Crown changed with circumstances, and for the sake of contrast it will be well to deal separately with each of the three periods within our parliamentary life in which the sovereign definitely used his powers to obtain a representation of the people which would at the same time be not unfavourable to the claims and exercise of the royal prerogative. There are two intermediate periods which in this connexion we need only mention to dismiss. From the accession of the Yorkist dynasty to the beginning of the Reformation (1460-1530), for reasons already mentioned, the Crown made a bold and fairly successful attempt to dispense with Parliaments altogether; while from the accession of the Stuarts to the outbreak of the Great Rebellion (1603-1642) the two reigning kings successively took their stand on the prerogative and relied on it to overawe their Parliaments into an attitude of submission and assent. There remain, then, the three periods which may be roughly described as those of the Lancastrians,

the Tudors, and the Hanoverians, during which, as they will be more particularly defined, the efforts of the Crown to procure an artificial harmony with the House of Commons must be separately noted.

Methods of
the Plan-
tagenets
and Lan-
castrians.

The attempts of the kings to control the composition of the House of Commons seem to have begun almost from the moment when there was a House of Commons to control. There is no need to estimate the relative influence of the Crown and of the sheriff, or even, what might be of greater practical importance, that of the Crown in competition with the great nobility. In some instances the Crown made use of the sheriffs for the furtherance of its own objects: but in general its influence may be said to have been exercised by methods which were alone at its disposal. These methods may be summarized as attempts to alter (a) the outward form and (b) the internal animating spirit of the House of Commons. Attempts of the first kind took one of two forms. Constitutional custom based on original convenience ultimately fixed the number of popular representatives at two respectively for each shire and borough, summoned in both cases through the sheriffs to one single assembly; but, for some time after the summons of the Model Parliament in 1295, the kings not unnaturally considered themselves justified in (1) *altering the numbers and details of election and meeting*. An examination of the instances in which the example of 1295 was departed from, would do much to show how far and when ultimately the parliamentary system was considered to be binding. Indeed, the name *Magnum Concilium* is sometimes given by constitutional writers to all assemblies called after 1295, which did not contain the proper constituents of a statutable Parliament summoned in a proper way. But, strictly speaking, the *Magnum Concilium* was the old Commune Concilium subsisting as a Council of Magnates, which the king, even as late as 1640, reserved to himself the right for certain purposes to consult. Such deviations as are now under consideration might more correctly be described as *Magna Concilia* reinforced by representatives of the popular constituencies. They are found generally in one of three forms. Sometimes the king summoned, in addition to the Lords, only one knight from each shire: at other times, as in 1352

and 1353, the mayors of certain towns would be directed to return one member for the borough, while the outward form of Parliament, to say nothing of its power, would almost entirely disappear in the separation of the proper constituent elements into several bodies meeting at different places. But since the constitutional principle ultimately triumphed, it may be safely asserted that these changes only show that the king dreaded hearing the national complaints, not that he wished to alter the essential features of the national assembly.

We may put down as the second method by which the king attempted to influence the outward form of the House of Commons, the occasional *shortening of the orthodox time* (2) *allowed for the conduct of elections*. The usual period of forty days which was to elapse between the issue of the writ and its return to Parliament or Chancery, was based upon an article of Magna Carta. But it was sometimes to the advantage of the local authority acting on the king's behalf that this time should be shortened. Thus, in 1327 the notice was limited to thirty-five days, in 1352 to twenty-eight days, while, as an extreme instance, the first Parliament summoned by Henry IV in 1399 had only seven days' notice, and contained, as it was intended to do, the same members as its predecessor.

Under the head of attempts to influence the *spirit* of the Commons come, firstly, some of the *alterations* found (1) from time to time *in the writs of summons*. Interpolations in this spirit were made with two objects; for they were intended, positively, to secure the election of certain classes such as the 'belted knights' already mentioned, and negatively, to exclude certain classes whose absence for some reason was specially desired. We have seen that a petition of the Commons themselves was taken for the basis of an ordinance in 1372 excluding both sheriffs and lawyers from eligibility for the House of Commons. But it was by a clause in the writs of summons issued to the sheriffs that, in 1350, directions were given that the persons chosen should not be pleaders and maintainers of quarrels or men who lived by such gains; while public opinion obliged Richard II to withdraw, as contrary to the ancient form and to the liberties of the Lords and Commons, the writs by which in 1387 he

had attempted to shut out his enemies from Parliament by directing the election of persons *in modernis debatis magis indifferentes*, i. e. who had not taken part in the recent quarrels. Instances of this special method of control are almost unique under later sovereigns. James I's prohibition of the election of bankrupts and outlaws has been already noticed as the foundation of the important case of *Goodwin and Fortescue*. But on the whole the writs remained substantially the same until the form in use at present was substituted by the Ballot Act of 1872.

But if any tampering with the terms of the writ was regarded as unconstitutional, it was always possible for a (2) powerful king or minister to *use the influence of the sheriffs and even of the great nobility* to secure the return of a favourable House of Commons. The first instance of a 'packed' Parliament is in 1377, when John of Gaunt, after the death of the Black Prince and in the imbecility of his father, procured the election of a House of Commons which reversed all the work of the Good Parliament of the previous year. In 1397 the exclamation of the condemned Earl of Arundel, 'the faithful commons are not here,' points to the same conclusion; while in 1399, among the accusations of Richard II was that of tampering with the elections by directing the sheriffs to return certain persons whom he named.

It will be seen that all the instances cited of undue royal influence over Parliament fall within the reigns of Edward III or his grandson. Not that the royal influence entirely ceased under the Lancastrians; but the peculiar position of that dynasty, with its purely parliamentary title, caused the kings in their action to be chary of anything likely to provoke popular murmurs; while their constitutional endeavours only left the way all the more clear for that manipulation by the sheriff which was met by a series of legislative acts, and for that influence of the great nobility which only collapsed with their own destruction in the Wars of the Roses. When the *Tudors*, in their desire to gain the assent of the nation to their religious changes, once more called Parliaments to something like regular sessions, they took care at the same time that *both Lords and Commons should remain under royal control*. The whole House of Lords could be restrained by the addition to their body of a sufficient number of royal nominees; and individual peers could be

Methods of
the Tudors.

punished for refractory conduct by exclusion from the royal presence. Moreover, the Crown still occasionally fell back upon its old policy of *dispensing with a Parliament* for years (1) together. Thus Elizabeth, when the Commons insisted, despite her prohibition, in discussing the questions of her marriage and the settlement of the succession, punished them by omitting to summon Parliament for five years (1566–1571); and again, after 1588, when the disappearance with the Armada of the long threatened danger from abroad made the Commons still more demonstrative, Parliament was only called four times in the fifteen years which elapsed before Elizabeth's death. In this, and in this almost alone of their dealings with Parliament, the Stuarts habitually imitated what, after all, was the weakest side of the Tudor policy. But if a Parliament was to be held, the Tudors neglected no means of procuring one favourable to the royal wishes. It was, as we have seen¹, for this purpose that at any rate the last three Tudor sovereigns *called into existence* (2) *a number of small boroughs*, later well designated by the epithet 'rotten,' whose only title to special representation was their complete subservience to the royal influence. It may have been somewhat similar motives which underlay the policy of *narrowing*, by the same medium of a royal charter, *the constituencies of the boroughs*; though possibly in the end these swelled the influence of the local landowners rather than that of the Crown itself. At any rate, where the king could not nominate he could influence, and the Council under Edward VI had no compunction about sending a circular letter to the sheriffs, now largely removed from the overshadowing influence of the local nobility, ordering them to see that the shires and even the boroughs elected men of learning and wisdom such as should be nominated by the Council. But, that the rival influence of the nobility still existed, whether exercised in its own behalf or in that of the government, is clear from the example of the Earl of Sussex, who, in the reign of Mary, wrote to the electors of Norfolk and Yarmouth ordering them to vote for his nominees. The same inference may be drawn from the argument, already noticed, which was used in the debate of 1571 on the repeal of the qualification of residence for burgesses, when it was objected that, in the event of such repeal, 'Lords' letters would henceforth bear all the sway.'

But the influence of the Crown did not cease on the threshold of Parliament. The Speaker, whose office only seems to date definitely from 1377, was the nominee of the Commons, though his election required confirmation by the Crown. Such an official was necessary, not only as chairman of the House, but also as its spokesman in communications with the sovereign. Before the Lancastrian epoch the holders of this office seem to have been generally the stewards or dependants of one or other of the great lords whose factions divided the court. Under the constitutional rule of the Lancastrians they must, on the contrary, if we may judge from the long-winded homilies which they inflicted on the king, have been really representative of the House of Commons. With the advent of legislation by bill, and owing to the usual absence of any minister from among the members of the Commons, it fell to the lot of the Speakers to explain the royal measures which were proposed for its acceptance to the House. So important a means of influence was not to be lost, and accordingly we find that the

- (4) Tudors practically secured for the king the *nomination of the Speaker* with the result that 'the Speaker, instead of being the defender of the liberties of the House, had often to reduce it to an order that meant obsequious reticence or sullen submission'.¹ Even Sir Thomas More, as Speaker in the Parliament of 1523, found it difficult to be anything except the subservient agent of the king and Wolsey, and it may well be imagined how far below his level the majority of his successors would be found in efforts to maintain the independence of the House of Commons. But as the Commons grew in strength, the influence of the Speaker was not found sufficient for its purpose; and although the severe dealings of the Star Chamber were hung *in terrorem* over refractory members, Elizabeth considered it necessary to
- (5) keep an important royal official, the *Secretary of State*, as a *permanent member of the Commons*. The fact that this post was held successively by Sir William Cecil, afterwards Lord Burleigh, and his son, is sufficient evidence of the importance attached by the queen to this method of influence.

¹ Stubbs, *Lects. in Mod. and Mediaev. Hist.* p. 272.

- But, besides these indirect methods of obtaining the assent of Parliament to the royal wishes, it was always possible for
- (6) the sovereign to fall back upon the prerogative, to issue proclamations, or to employ the dispensing power of the Crown

practically to nullify the parliamentary statutes, to resort to arbitrary methods of raising supplies which should make him less dependent on a grant from the House of Commons, to single out for punishment those members whose speeches were offensive to the king, or in the last resort to forego the summons of Parliament altogether. But intimidation, amounting to the direct use of force, was a weapon used most carefully, if not sparingly, by the Tudors in their relations with the Commons. Henry VIII based some of his most unconstitutional actions on the sanction of Parliament; the Council of Edward VI consented to the repeal of more than one of the harsh measures enacted under his predecessor; Mary only obtained her desired restoration to communion with Rome by a sacrifice which almost robbed it of all meaning; Elizabeth, in continual conflict with the Commons and inclined to assert her own rights, yet gave way more than once to the plainly expressed feeling of the House in a manner that served only to endear her all the more to their hearts.

But the Stuarts brought with them high notions of the prerogative which led them to regard constitutional forms with contempt. Thus while, in the matter of actual expedients to which they resorted, the Stuarts were perhaps mere imitators of their predecessors and not the innovators that they are generally given the credit, or rather discredit, of having been, yet they were for ever challenging Parliament by a definition of the rights of the Crown, and thus provoked counter-definitions as to the limits of a power whose merit it is that it has never been reduced to definition. Thus the indirect expedients of the Tudors for keeping Parliament in friendly relations with the Crown, practically fall into entire disuse. The wholesale creation of 'rotten boroughs' ceased with the accession of the Stuarts; and those which were created or revived under James I and Charles I owed their privilege to an order of the House of Commons for the issue of a writ on their behalf. Again, all actual interference with the elections or the issue of directions as to who should be elected seems to have ceased, if we may except the strange interpolation of James I in the writs for the elections to his first Parliament, which forbade the election of bankrupts and outlaws. James I and his son seemed to prefer to meet their Parliaments face to face or not at all. But the resolute

Causes of
the Stuart
failure to
control
Parliament.

attitude of the House from the very first convinced them of the necessity of occasionally resorting to other means than mere force for making Parliament submissive. But even here, in the measures they adopted for this purpose, they pitched upon methods which the Tudors would have scorned. In 1614 James, at the advice of Bacon, made an attempt to form within the Commons a party of persons devoted to the interests of the king. But these 'Undertakers,' as they were called, met with entire failure, and the Parliament which they were intended to manage broke up without having enacted a single legislative measure, and acquired thereby the nickname of the 'Addled Parliament.' No happier was the attempt of Charles I to stave off criticism in his second Parliament of 1626 by nominating some of the leading members of the opposition as sheriffs, which disqualified them for the time from membership of the Commons. But the House were as exasperated in the one case as in the other by these obvious attempts to break the growing opposition to the Crown; and meanwhile, the new kings, abandoning the salutary plan of Elizabeth, only placed in the House as exponents of the royal will second-rate politicians and mere mouthpieces of the ministers who in reality directed the royal policy; and such nonentities the Commons ignored, as they could well afford to do. It is no wonder, then, that the means which these kings preferred were such as overrode and ultimately abolished all constitutional forms whatsoever, or that Parliament ultimately dealt out to them that measure of justice which the kings would fain have inflicted on the Commons.

Methods
of the later
Stuarts and
Hano-
verians.

The Restoration brought back a Parliament much more truly loyal to the Crown than any since the Tudor times, and Charles II was restored unconditionally to the prerogatives enjoyed by his ancestors. But the Rebellion lay between him and the methods employed for the maintenance of those prerogatives by his father and grandfather. He was forced to have recourse to subtler modes for keeping a hold upon his Parliaments when once the fervour of their early loyalty had spent itself. And yet the old methods did not die without a struggle. In 1674 the city and county of Durham had for the first time been summoned to take their place in the representative system of the country. In 1681 Charles, not to be outdone

by Parliament, called out the prerogative, which had been for some little while in abeyance, of enfranchisement by royal charter in the case of Newark; but the attitude of the Commons warned him not to repeat the measure. Again, both he and his brother made that assault upon the existing charters of the boroughs the effect of which came very near being so serious, but which proved 'the last form of violent external measures used by the king to affect the representation.' Charles took care also that the Crown should be adequately represented in the House of Commons, and he even lent himself to the formation of a group of members within the House for the maintenance of the royal influence and the distribution of its favours. But all these are as nothing to that gigantic *system of parliamentary corruption* which arose under Charles II when the loyal feeling of Parliament began to wane in the ministry of Danby, and was rendered doubly necessary when the Revolution of 1688 practically removed from the power of the Crown all means of direct and open influence on the Commons, while it left the Commons a close oligarchy with increased power and no correspondingly increased responsibilities. For more than a century this gross system lay like a blight upon the constitution, affecting even the keen party contest of the reigns of William III and Anne, but flourishing especially amid the party intrigue and selfish scramble for office which characterizes the early years of the Hanoverian dynasty. Such corruption was protean in its shapes; but it is both possible and necessary to discriminate between the chief forms which it assumed.

The most gross method was (a) the *direct payment* of sums of money in return for votes given either at the polling booth by electors or by members in Parliament. This was chiefly rendered possible by the general state of the finances and especially by the fact that there was a portion of the royal income over which Parliament had no control and which was therefore specially adapted for use as secret service money in support of the Crown's influence over Parliament. In the actual traffic over the rotten boroughs the Crown found formidable rivals in the great nobility; but yet in 1793 an estimate shows that sixteen members of the Commons were the direct nominees of the Crown, and the secret correspondence of George III and his

ministers affords abundant proof of the large sums spent on the direct bribery of 'free and independent' voters at the hustings. The easier method, however, was to obtain by some heavy bribe, probably other than pecuniary, the support of some of the great boroughmongers; while the ministers of the Crown kept the revenues which were at their disposal for the purchase of votes, to be given for actual measures before Parliament.

A more permanent method was (b) the formation of a ministerial party within the House of Commons by the judicious, if wholesale, distribution of *offices and pensions*. Of the gradual disqualification of office-holders for seats in the House of Commons mention has already been made¹. It will be sufficient here to summarize the results of the various legislative efforts in this direction. Thus, at the time of the Place Bill of 1742, 200 members of the House of Commons were said to hold Crown appointments of various kinds. That Act only affected the holders of minor offices, but had none the less a salutary influence in checking this means of royal influence. Still, many placemen remained in the House; nor was their influence disguised. The party of 'King's Friends' succeeded where James I's Undertakers had met with failure, and Burke's indignant tirades in his 'Thoughts on the Present Discontents' took practical shape in his great scheme of economical reform in 1780, whereby he proposed the abolition of fifty offices held by members of one or other House of Parliament. Notwithstanding the opposition in favour of retaining 'the turnspit in the king's kitchen' as a member of Parliament, Lord Rockingham's Act of 1782 suppressed a number of offices connected with the royal household which, in the event of their revival, should be considered new offices within the meaning of the Act of 1706 in amendment of the Act of Settlement; in other words, they should disqualify their holders for seats in the House of Commons. This was 'the last of the statutes which, in creating official disqualifications, had in view the independence of the House of Commons².' Future disqualifying Acts were chiefly intended to secure a permanent civil service which should be undisturbed in the discharge of administrative routine by considerations based upon the fortune of party politics. The effect of these Acts has been to reduce the number of placemen in the House of Commons from 270

¹ p. 162.

² Anson, *Law and Custom of Const.* i. 324.

at the accession of the Hanoverians, to less than ninety under George IV. The Reform Act of 1832 had an immediate influence in the same direction. At the same time, there has always been a considerable number of officers of the army and navy who, as having been bred up in feelings of loyalty to the Crown, are regarded by the extremer radicals as the most dangerous type of placemen. But the very knowledge of this loyalty was a dangerous weapon in the hands of unscrupulous politicians, and neither Walpole in the case of Pitt, nor George III in that of General Conway—to mention only the most notorious instances—hesitated to dismiss the holders of these non-political offices for acts and speeches in Parliament. General Conway, however, was the last case; and the constitutional temper of Lord Rockingham's first administration put an end to this unwarrantable use of the royal power.

The question of *pensions*, as well as offices, had been dealt with by the Act of Settlement, whose severe provisions had here also been modified by the Act of 1706, which contented itself with closing the doors of Parliament only to those whose pensions were enjoyed during the pleasure of the Crown. To these an Act of the first year of George I added pensioners for terms of years. But none of these provisions could cover the case of secret pensions or of pensions granted to the wives of the royal hirelings. Against such there was no safeguard so long as the system of management of Crown revenues left a sufficient sum of money in the king's hands which could be applied to such purposes. The history of civil list pensions, apart from the question of a seat in Parliament, is a revelation in itself of the irresponsible squandering of money which was a characteristic of eighteenth-century government. The first legislative attempt to restrain the power of the Crown to grant pensions charged upon its hereditary revenues and whose payment was binding on its successors, was on the accession of Queen Anne, when the Act which first restrained the alienation of Crown lands also provided that no portion of the hereditary revenues could be granted away for any term beyond the life of the reigning sovereign. With the accession of George III such pensions became chargeable on the Civil List, and their gross amount was considerably restricted by Lord Rockingham's Act of 1782. The Irish pension list, whose history is particularly scandalous,

and the Scotch pension list remained untouched by the Act of Anne. In 1793, in imitation of the English example on George III's accession, the hereditary revenues of the former were exchanged for a fixed Civil List, together with a separate pension list of no less than £124,000. This sum was reduced in 1813 and again in 1820 to the substantial figure of £50,000. In 1810 the Scotch pension list was reduced by Parliament to £25,000. In 1830 the three pension lists were consolidated and the amount reduced from more than £145,000 to £70,000. Finally, on the accession of the present sovereign the right of the Crown to grant pensions was limited to £1,200 a year, and qualifications were stated for such pensions which would remove them beyond the region of political reward.

A far more subtle method of buying votes than any yet enumerated was (c) the judicious distribution among supporters of the government of *shares in loans, lotteries and contracts*. These were all favourite means of securing a parliamentary majority during the first twenty years of the reign of George III. The shares in loans and the tickets of lotteries were distributed among friends of the ministry, and were consequently raised on terms especially favourable to those who held the initial shares. The scandals caused by the transactions of Bute, of Grafton and of North himself, caused the latter in 1782 to raise a new loan by a system of close subscriptions; but the deathblow to the waste of public money which had been caused by the system of jobbing loans and lotteries, was dealt by the younger Pitt, who developed North's latest device for raising money into the modern form of contracts by sealed proposals from different persons, which were opened in each other's presence and the lowest tenders then and there accepted. The extravagance of loans and lotteries was only outdone in sheer wastefulness by the grant of lucrative contracts for the public service, a form of bribery which was especially acceptable to the commercial members of the House. The flagrant abuse of this system during the course of the war with the American Colonies caused the introduction of a bill to disqualify close government contractors for a seat in the House. This, though at first rejected, was successfully carried through by the second Rockingham ministry in 1782.

An investigation into the sources and the prevalence of

corruption in the eighteenth century leaves us wondering how in such adverse conditions public integrity could in any sense be kept alive. It must, however, be remembered that the legitimate prizes were so great as to attract the best ability to the service of the State. Thus, while a parliamentary majority was held together by illegitimate means, the more honourable statesmen, such as Rockingham and both the Pitts, unsparingly condemned the use of such methods, even while they found themselves obliged to acquiesce in their existence. But such condemnation had a wholesome result: it kept alive a standard of public opinion in the matter; it gradually eliminated the grosser methods of corruption, and it prepared the way for a time when political principles should be sufficiently strong to enable a popular minister to dispense with a bought majority, and when the reform of Parliament should put such methods of diplomacy beyond the reach of the most skilful party manager. But even before parliamentary reform was obtained, it should be said, in defence of the existing constituencies, that they represented on the whole the most educated classes in the country, and that they proved themselves in moments of popular and national excitement not unwilling to respond to pressure from outside. Moreover, in Parliament itself the existence of political parties ensured the advocacy, if only for party purposes, of popular measures and their support by popular arguments. Thus the long exclusion of the Tories from power under the first two Hanoverian monarchs turned the defenders of the prerogative into the champions of parliamentary purity; and the equally long exclusion of the Whigs under George III turned the exponents of oligarchical government into the proposers of a moderate, but sufficient, scheme of parliamentary reform. Nor should the growing influence of the press be underrated, for it triumphed in its struggle with the House of Commons over the publication of debates, and together with, and perhaps with more wholesome effect than, the existence of parties, it must have done much to form an intelligent public opinion.

§ 32. Meanwhile, the question of PARLIAMENTARY REFORM was attracting a continually larger share of the public attention. The movement which culminated in the Act of 1832 may be said to have gone through four phases. The first of these

Why corruption did not destroy public life.

Reform of the House of Commons. 1st phase —to 1790.

may be described as preliminary. In point of time it was prior to the French Revolution, and was marked by the suggestions of individual statesmen who felt the evils of the existing system. The first of these was no less a person than the elder Pitt, who as *Lord Chatham* on two separate occasions, in 1766 and 1770, pointed out the necessity for the amendment of the borough representation, and suggested as a remedy the addition of a third member to every county 'to counterbalance the weight of corrupt and venal boroughs,' and ventured to prophesy that, 'before the end of this century, either the Parliament will reform itself from within, or be reformed with a vengeance from without.' It is much to the honour of the notorious *Wilkes* that the next suggestions of parliamentary reform are associated with his name. In 1776 he proposed a bill which came nearer than any of these earlier proposals to the principles which received recognition in 1832. Thus, the disfranchisement of the rotten boroughs, which even Chatham had not felt justified in suggesting, was to be accompanied by an increase of members from London and the large counties, and the enfranchisement of several 'rich, populous, trading towns.' Less merit attached itself to the terms of a measure introduced in 1780 by the *Duke of Richmond*, which took for its basis the principles of annual parliaments, universal suffrage and equal electoral districts. These were three points of the later 'People's Charter' and were supported outside the walls of Parliament by the 'Society for Promoting Constitutional Information,' which was founded in the same year by Major Cartwright and joined by members of both Houses. But the bill was proposed in the midst of the Gordon riots, and met with no sympathy in Parliament itself. The last of these preliminary attempts at reform is connected with the name of the younger *William Pitt*, who made no less than three proposals in this direction. The first of these was in 1782, during the second Rockingham administration, when his motion for a committee to inquire into the state of the parliamentary representation was rejected by the small majority of 20. 'It has been noticed,' remarks Mr. Lecky, 'that the reformers never again had so good a division till 1831'.¹ Nothing daunted, Pitt returned to the charge in the very next year, and while in opposition to the

¹ *Hist. of Eng.* iv. 223.

Coalition Ministry of Fox and North, he advanced a step further by the proposal of three tentative resolutions for measures to prevent bribery, disfranchise corrupt boroughs, and increase the county members. But these suggestions, while disappointing to the advocates of reform, who were flooding the House with petitions, did not commend themselves to a Parliament whose conscience had been allayed by Lord Rockingham's late moderate measures, and Pitt's motion was rejected by a majority of 144 in a full house of 450. The third and last attempt was in 1785, when Pitt had taken his place at the head of the ministry as the nominee of the king. Despite the known hostility of George III, Pitt redeemed the pledge he had so often given, and introduced a comprehensive scheme of reform. By this he proposed (*a*) to distribute among London and the counties, and certain large, hitherto unenfranchised towns, a hundred members gained by the disfranchisement and purchase of small and 'rotten' boroughs: (*b*) to enlarge the county franchise by the addition of copyholders, and (*c*) to compensate the proprietors of the disfranchised boroughs from the revenues of the State to the amount of a million sterling. Pitt thought, no doubt, that this was the only way out of a great practical difficulty, and he actually applied it afterwards on a large scale for effecting the Irish Union; but the ardent reformers refused to recognize the vested right of property in the representation, while the king and the rest of the ministry were directly hostile. Pitt was even refused leave to bring in his bill, but by a diminished majority of 74 in a House of 420 members. In 1790, on Flood's motion, and again in 1792 on Grey's motion in favour of reform, Pitt acknowledged that he still entertained an opinion in its favour, although he believed that under the present circumstances it was impracticable.

In truth, the first phase in the reform movement was at an end. It was no longer a question which depended for its advocacy on an individual statesman. The early stages of the French Revolution made it in England the creed of a party which welcomed the example of a people struggling to be free; while the excesses of the Revolution as it proceeded, together with the sufferings of the working classes in England by reason of the prolonged war, threw the cause of parliamentary reform

Second
phase—
1790-1797.

into the hands of leaders of 'Hampden Clubs' and other democratic associations which found their support among the unenfranchised classes of the nation. Thus a second phase may be said to extend from 1790, when Pitt definitely renounced the cause, to 1797, when an elaborate motion of Grey and Erskine was rejected by a large majority. The proposals of the reformers during these years under the leadership of Mr. Grey were on the lines of those which Pitt had recently formulated, and were supported by the most respectable among the political societies which then sprang into existence, namely that known as the 'Friends of the People.' With the factious secession of the opposition from the House of Commons in 1797 after the defeat of Grey's motion, and in protest against the continued repressive policy of Pitt's parliamentary majority, the reform movement entered on its third and least creditable phase. For twenty-three years (1797-1820) it was practically the monopoly of demagogues outside Parliament. Grey and Erskine were called to the House of Lords, and its advocacy in the Commons was left to the eccentric and aristocratic Sir Francis Burdett, whose reiterated motions in behalf of the earlier proposals of the Duke of Richmond, to which was now added vote by ballot, finally left him with one supporter in the House.

Third
phase—
1797-1820.

The fourth and concluding phase began when Lord John Russell associated himself with the question by his first motion in 1820 in favour of reform, and thus restored the leadership in the movement to the Whigs. In 1822, 1823 and 1826 he proposed tentative motions on the old lines which had been laid down by Pitt and Grey; but they were all equally rejected by majorities of more than a hundred. The only prospect of success seemed to lie in a change of tactics. The reformers determined to attack and destroy in detail all those boroughs which could be convicted of gross corruption. Such disfranchisement, as we have seen¹, was not altogether unknown in the past, and bribery and traffic in seats were now to be regarded, not so much as regrettable but perhaps necessary accompaniments of the political system of the time, as serious moral evils which must at all costs be rooted out. In 1820 a preliminary success was gained by the disfranchisement of the Cornish borough of Grampound, whose members were transferred to the county of York. But the reformers

Fourth
phase—
1820-1832.

¹ p. 174.

desired to go a step further, and to transfer representatives so gained to the large manufacturing towns which were as yet entirely unrepresented. With this view, they attacked four notorious cases which had been exposed in the elections of 1826. These were Northampton and Leicester, where the corporations had applied large sums of the corporate funds to support ministerial candidates, and Penrhyn and East Retford, where bribery had been employed in the most shameless manner. But the proposals of the reforming party were defeated over their attempts to transfer the seats to Manchester and Birmingham. Had the government conceded these demands, it is possible that the progress of reform would have been postponed for many years. As it was, their rigid opposition caused the resignation of all the more liberal members of the party and weakened their ranks for the struggle which now became inevitable.

In 1830 Lord John Russell proposed the direct enfranchisement of Leeds, Birmingham and Manchester, and O'Connell brought forward the programme of the extremer radical party. But the death of George IV in this year and the consequent dissolution of Parliament brought matters to a crisis. The immediate occasions of the success of the reform movement may be said to have been three. In the *first* place, the Catholic Emancipation Act of 1829 had already weakened the Tories and disorganized all parties in the country, which were thus ready to re-form themselves on the new basis of some popular cry. This was *followed by* the Revolution of 1830, which deprived Charles X of his crown for his attempts to repress freedom of discussion and representative government in France. The excitement which this event produced was heightened by the revolt of Belgium from Holland, to which she had been joined in 1815. *Finally*, the Duke of Wellington, as Prime Minister, threw down a direct challenge to the country when, in the debate on the address and in answer to Earl Grey, he declared that 'the legislature and system of representation possessed the full and entire confidence of the country.' A fortnight later the Duke was defeated on a motion of inquiry into the Civil List, and resigned. Lord Grey became Prime Minister, and was of course pledged to a measure of parliamentary reform. Despite the enormous obstacles—on

The final
struggle for
Reform.

the one side, the reluctance of the king and the open hostility of the boroughmongers, and through them of a majority in perhaps both Houses of Parliament; on the other side, the desires of the more ardent reformers who now looked for an adequate realization of their dreams—the measure of the government, moderate and yet comprehensive in its provisions, was carried to a triumphant conclusion. Three bills were in succession introduced. The first, proposed by Lord John Russell in March, 1831, was only carried through the House of Commons by a majority of one on its second reading, and was defeated in Committee. Parliament was dissolved, and the new bill was passed in a House of Commons full of members pledged to reform, by a majority of 136, only to be thrown out in the Lords by 41. A third bill was promptly introduced, which remedied some of the objections taken to its two predecessors: thus it retained the number of members of the House at the same total as before, instead of reducing them as was at first proposed. This bill passed the Commons by a majority of 162, and in April, 1832, its second reading was affirmed by the Lords by 9 votes. But this was only preliminary to its destruction by amendments moved in Committee. In fact, the moment had come when either the Lords must give way or the ministers resign. The king refused to create a sufficient number of peers, and the ministers did resign. The Commons passed votes of confidence in them: Wellington in vain attempted to form a cabinet, and Grey and his followers returned to office. The king now put no obstacle to the creation of peers, but at the same time used his personal influence to prevent its necessity. The Duke of Wellington also came to the rescue; the opposition peers were persuaded to absent themselves, and the bill was passed.

The Reform Act of 1832. The details of its provisions have already been described. There were *four chief evils of the old system* which it recognized and met. Eighty-six *rotten boroughs* were disfranchised wholly or in part. Large *town populations hitherto unrepresented* were provided for, and the more populous counties received extra consideration. While saving the rights of individual electors, the *hitherto restricted franchise*, whether in counties or boroughs, was considerably enlarged, although each was established on a separate basis. One effect of this

distinction between the county and borough franchise must not pass unnoticed. So long as it existed 'a measure of redistribution was necessarily a measure of disfranchisement. Where a borough ceased to return members, its electors . . . with the exception of those who might possess the county qualification, ceased to be electors at all'.¹ It will be seen that this applies also to the Act of 1867, but not to the Redistribution Act of 1885. Finally, the Act sought to diminish the *enormous expenses at elections* by providing for the registration of electors, the increase of polling districts and the limitation of the days of polling. These points received further attention from Parliament during the succeeding sessions; but as to general principles the Whigs regarded the Act of 1832 as final, and no further motion for reform was made in Parliament for 20 years.

¹ Anson,
*Law and
Custom of
Const. i.*
121-2.

But the people in general were far from being satisfied. The Reform Act had done nothing except provide 'a remedy for the worst evils of a faulty and corrupt electoral system. It had rescued the representation from a small oligarchy of peers and landowners and had vested it in the hands of the middle classes. But it had spared many boroughs, which were perhaps too small to exercise their suffrage independently: it had overlooked the claims of some considerable places²;' and had not taken the working classes into account at all. From 1838 to 1848 the cause of reform was in the hands of the Chartists, who regarded the establishment of the *six points of the People's Charter* as a panacea for all the political evils of the country, and refused to work with the free-traders, whom they stigmatized as 'quacks.' Their six points were the old proposals of manhood suffrage, annual Parliaments, equal electoral districts, and vote by ballot, together with two new suggestions for the revival of payments of members, and the abolition of the property qualification for members of Parliament which was merely modified in 1838. The leaders of the movement were Daniel O'Connell and Feargus O'Connor, and it was productive of considerable violence in various parts of the country; but it was not until the discovery of the fictitious names appended to a monster petition presented to the House of Commons, and purporting to bear more than five million signatures, that the movement was finally discredited, and the question of the extension of the

The Reform
after 1832.

² Erskine
May,
*Const.
Hist. i.*
450.

franchise once more became a cabinet measure. In the course of the next fifteen years (1852-1867) four abortive measures were proposed, three of which were associated with the name of Lord John Russell. Thus in 1852 he proposed to lower the franchise so as to embrace classes, especially the most skilled artisans, who had not hitherto been included. In 1854 he suggested measures for the representation of minorities and for giving greater weight to the educated and thrifty classes. These last were imitated by Mr. Disraeli in 1859 in the government of Lord Derby, who also suggested the assimilation of the county and borough franchise. In 1860 Lord John Russell, in Lord Palmerston's ministry, made his final proposal of reform, in a bill which, while lowering the franchise, spared all the smaller boroughs.

No other governmental measure was proposed during the lifetime of Lord Palmerston, who was known to be unfriendly to the cause of parliamentary reform. His death in 1865, and the accession of Earl Russell to the post of Premier, revived the hopes of the reformers. But circumstances were unfavourable; reform had not been a moot point at the previous elections, most of the members were of Lord Palmerston's opinion, and were not anxious to run the risk of a dissolution after one session. A bill, however, was introduced by Mr. Gladstone, but a large secession took place in the party, which was nicknamed by John Bright the 'Cave of Adullam,' and the ministers carried their proposals by such small majorities that they regarded it as a defeat and resigned. Lord Derby was called to office again with his party in a minority in the House of Commons, and the popular disappointment at the failure of the Whigs culminated in a riotous meeting in Hyde Park. Some measure of reform seemed imperatively necessary: the Conservatives introduced their bill, and chiefly owing to the tact of Disraeli, who had the conduct of it, the ministry gained the support of the Dissident Whigs, and in 1867 passed through a scheme, stripped of all those provisions and safeguards which had originally commended it to the real supporters of the ministry, and which ultimately satisfied a very small section of the House.

The Representation of the People Act, 1867.

The chief provisions of the Act, besides the redistribution of fifty-two seats gained from disfranchised boroughs, were the lowering of the property franchise and an addition to the occu-

pation franchise in the counties, and the introduction of the household and lodger franchise into boroughs. By the influence of Lord Cairns provision was also made for the representation of minorities by the addition of a third member for Manchester, Liverpool, Birmingham and Leeds, electors not being allowed to vote for more than two candidates. Partial and unsatisfactory though this measure was in the eyes of reformers, it almost doubled the electorate. The small body of about 300,000 who possessed the franchise before 1832 had risen under that Act to 1,370,000 just before the further Act of 1867 came into operation. The operation of that Act raised it to three millions.

But further legislation was inevitable. Mr. Gladstone's first ministry (1869-1874) contented itself with the *Ballot Act* of 1872, which should secure the poorer voters against undue influence by legalizing the system of secret voting. From 1872, however, a motion for the extension of the county franchise became an almost annual measure, until Mr. Gladstone found himself strong enough in his second ministry (1880-1885) to satisfy the utmost aspirations of his most ardent supporters. The two chief notes of the Act of 1884 were the assimilation of the county and borough franchise and a thorough redistribution of seats with some approach to equal electoral districts. No less than two million voters were thus added to the electorate. Thus of the six points of the People's Charter a lapse of less than forty years had sufficed to accomplish all except two. The property qualification for members of parliament was abolished in 1858; vote by ballot was granted in 1872, and the last Reform Bill practically provided for manhood suffrage and made a very long step towards equal electoral districts. Annual Parliaments and payment of members alone remain; and while the latter has the support of a large and influential section of the Radical party, the former, in the extended condition of the electorate, may well be regarded as impracticable.

The plain and intelligible principle of 'counting heads' has, by the Act of 1884, received such complete recognition that it would probably be impossible, even if it were ever considered desirable, to go back upon it and to attempt to found our system of representation on any other basis. It is

The Ballot Act.

The Representation of the People Act, 1884.

The Redistribution Act, 1885.

The representation of minorities.

thus all the more important to note some of the suggestions which have been made from time to time and have even been embodied in abortive bills, *for the representation of minorities* whether based upon local, social or intellectual considerations. Some of these suggestions were too obviously artificial to be of more than temporary importance. Such were the varieties of what were disdainfully called *fancy franchises*, which found a place in the abortive bills of 1854, 1859 and Mr. Gladstone's measure of 1866, and which were proposed and rejected in the bill of 1867. Their chief object was the recognition as parliamentary voters of 'the educated or the thrifty man.' One of the most serious objections to many of them was that it would be easy to create the necessary qualification with a view to an election. A similar objection does not hold in the case of another of these suggestions, the institution of what have been called *three-cornered constituencies*. But this precautionary measure, which was first suggested in the bill of 1854, was actually embodied in the Act of 1867, and was abolished in the Redistribution Act of 1885. The chief objection was that it practically left the majority of voters in the largest cities with one member to represent their views, and thus reduced their power in Parliament to the level of the smallest constituency in the country. A third suggestion in the same direction is what was originally known from its promoter, as *Haré's scheme*, which gained the warm applause of John Stuart Mill, and which in a slightly modified form as *proportional representation* has won its way with skilful advocates to a considerable place in the public eye. The details are too long for reproduction here. Suffice it to say that a long division sum, with the number of registered electors as dividend and the number of seats to be filled as divisor, will give as its quotient the necessary constituency for an elected member. Voters would be allowed to record their votes in order of preference for all candidates throughout a larger or smaller district as might be thought most practicable. The voting-papers taken at random would be counted until some one candidate had secured the requisite number of qualifying votes. All votes subsequently given for him should then be transferred to the voters' second choice. In this manner, it is contended, all the seats will gradually be filled, no votes will be thrown away

in hopeless minorities, all interests will be adequately represented, and the real strength and opinion of the electorate will be satisfactorily tested. It may be doubted, however, whether the choice of the voting-papers, under any system of reckoning, does not reduce the scheme to a lottery and thereby prevent it from becoming, except in such a rough-and-ready way as the present system provides for, a thoroughly trustworthy representation of the country.

CHAPTER V.

THE HOUSE OF COMMONS IN ACTION.

Growth
of the
power of
the House
of Com-
mons.

§ 33. The history of the form of the House of Commons has now been sketched to its completion, or rather, to the assumption of its present shape. It is time to turn and trace the growth of the constitutional powers from its first appearance to its present omnipotent position. It is primarily as the legislative assembly of the nation that Parliament plays its part in the constitutional system of the country. But the duty of the House of Commons in this respect was originally quite subordinate to its functions in the matter of taxation; while the important share which it now takes in criticism of the executive, was a still later development in its general acquisition of powers. Under these three heads, then,—taxation, legislation and general political deliberation—may most conveniently be arranged all that should be said of the *constitutional progress of the House of Commons*. Now, theoretically and in a general kind of manner, the kings seem to have been willing, almost from the very beginning of Parliaments, to accord to the Commons a participation in the most important powers of government. Thus the Confirmatio Cartarum of 1297, which followed hard upon the meeting of the Model Parliament, promised in the name of the king with regard to taxation, that 'for so much as divers people of our realm are in fear that the aids and tasks which they have given to us before time towards our wars and other business . . . might turn to a bondage to them and their heirs . . . so likewise the prises taken throughout the realm by our ministers; we have granted for us and our heirs . . . that for no business henceforth will we take such manner of aids, tasks nor prises, but *by the common assent of the realm*, and for the common profit thereof, saving the

ancient tasks and prises due and accustomed'.¹ Even more definite was the acknowledgment made in the Parliament of Edward II in 1322 as to legislation, that 'the matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded and established in parliaments by our lord the king, and by the assent of the prelates, earls and barons and *the commonalty of the realm*, according as hath been heretofore accustomed.' But this was an equality which in actual practice and in the prevailing division of estates, was worthless. The true position of the Commons was only to be won gradually, by hard fighting, by making use of opportunities; the attempt could not begin until the Commons had, as a separate House of Parliament, acquired a solidarity of form and interests; and it was only natural that the first acknowledged and substantial victory of the Commons should be in that department in which their help had been first required and which in the end they have entirely monopolized.

The leaders of the assembly which had wrung the Confirmatio Cartarum from the representatives of the absent king, had intended by the words quoted above to ensure the surrender by the king of all right to direct and indirect TAXATION alike. But as far as direct taxation was concerned, the king still felt himself justified in levying, without any special consent, feudal taxes, such as the three aids and scutage, as well as the old landlord's tallage on ancient demesne. Consequently in 1340, soon after the estates had arranged themselves in two houses, Edward III was forced to consent to a statute which ordained that 'henceforth no charge or aid should be imposed on the nation except by common assent of the prelates, earls, barons and other great men and the commons of the realm assembled in Parliament.' But, although this statute was an answer to the petitions of the Commons, there is nothing to show that the power of making money grants was regarded as peculiar to the representative branch of Parliament. As a matter of fact, although the statute was intended to preclude all species of unparliamentary taxation, the king did not hesitate in 1346 to exact a feudal aid at the knighting of the Black Prince, and that moreover at a double rate; while under Richard II a scutage was remitted in 1385 as a tax which the king still regarded as his

¹ *Sel. Chart.*
p. 496.

Direct attempts to obtain control over (1) direct taxation;

due when he went to war in person. But the first business of the Commons was to insist on the necessity of their being consulted as a preliminary to any grant of taxation. The usual method seems to have been for the king to send commissioners to each house of Parliament, as he did also to the two clerical Convocations, to lay his demands before them. The estates and, after the division into two Houses, the Houses then joined in consultation, the result of which was the declaration of the method by which the money should be raised, whether as tenth and fifteenth, wool tax, or tonnage and poundage, and of the proportions in which it should be assessed upon the various estates. At first each estate voted its grant in separate proportions; but the first advance in the direction of the financial supremacy of the Commons was made when those proportions were reduced to two in number and the difference was based on local and not upon class distinctions. But for the present the grants were still made by the two Houses jointly. It is in 1395 for the first time that the decisive share which the Commons may be said to have gained in the reign of Edward III, finds definite expression in the words of the grant. The money was said to be given 'by the Commons with the advice and assent of the Lords.' This form was repeated in two of the earliest Parliaments of Henry IV (1401 and 1402), and although the form was not always adhered to, the principle of the necessity of participation by the Commons in any such grant, may be said to have received formal recognition in 1407 when Henry IV, in response to a remonstrance of the Commons at his consultation on financial matters with the Lords alone, allowed that neither House should make a report on a grant until both were agreed, and that then the report should be made by the Speaker of the Commons. It is, however, unlikely that this concession 'was at the time understood to recognize the exclusive right of the Commons to originate the grant' (Dr. Stubbs¹). It is enough to suppose that, from the time of Richard II, they were regarded as not merely necessary participators, but as the possessors of the preponderating voice. Indeed, it was not until the reign of Charles I that grants were definitely expressed as made by the Commons alone. In 1625 the subsidies were stated to be granted by 'your Commons assembled in your High Court of Parliament.' The further question of the atti-

¹ *Const. Hist.* § 370.

tude of the House of Lords towards a money grant must be reserved until the mutual relations of the two Houses are considered.

Meanwhile, the early attempts of the Commons to control the grant of direct taxes were evaded, among other ways, by the private dealings of Edward III with the merchants. This proved to the Commons the necessity of keeping a hand on such indirect means of raising money as were afforded by the Customs, Purveyance, and Commissions of Array. But even here the power of Parliament could only be exercised in an indirect manner. Definite prohibition, until the Commons were strong enough to enforce it, could have but one effect. The kings would either ignore it altogether, or would find other means of obtaining what they wanted. Thus the only wise policy for the Commons to pursue was, while acquiescing in the fact of a money grant unconstitutionally obtained, to assert the principle that all grants must be sanctioned by their vote. The detailed history of the Customs duties is given elsewhere¹. Here¹ it is merely necessary to recall that in 1275 the Commune Concilium had granted to the king the customs on wool, leather and wine at a fixed rate, of which the Confirmatio Cartarum in 1297 forbade any increase under the expressive name of a Maltolt. But in 1303 Edward I obtained such increase by private agreement with the foreign merchants; and in 1353, by the Statute of Staples for the regulation of the foreign trade, Parliament not only acquiesced in the levy of this increased rate from the foreigners, but even turned the Maltolt into a parliamentary grant of a subsidy on wool. Towards the end of Edward III's reign the king's frequent attempts to implicate the Commons in his foreign policy, and his continuous demands on them for money to carry on his wars, emboldened them to go further, and in 1362 they obtained a statute to the effect that *neither merchant nor any other body should henceforth set any subsidy or charge upon wool without consent of Parliament*. This was confirmed in 1371; and after the accession of Richard II until the reign of Queen Mary, no attempt was made at the unauthorized taxation of merchandise. But the increased manufacture of cloth in England appreciably lessened both the custom and the subsidy on the export of wool; and perhaps in compensation the customs on wine and general merchandise,

(2) indirect taxation.

Customs.

Chap. x.

Their early settlement.

36 Edw. III, c. 11.

known under the name of tonnage and poundage, were from 1418 granted to the king for his lifetime.

* Their increase under the Stuarts.

It does not seem that Parliament demurred to the raising of new Customs duties by Mary and Elizabeth. But when James I, acting on these precedents, at the beginning of his reign imposed duties on certain commodities, including one of five shillings per cwt. on imported currants beyond the half-crown which the life-grant of tonnage and poundage had given him, a certain *John Bate*, a merchant of the Levant Company, refused to pay, on the plea that Parliament alone could increase a tax which it had imposed. The case was argued out before the judges, whose distinction between the ordinary or common-law and extraordinary or absolute power of the Crown, gave into the king's hands the regulation of the amount of Customs dues which should be levied. This judgment was regarded as a test, and in reliance on it the Treasurer, Lord Salisbury, issued the usual Book of Rates embodying the new duties. The question of the king's right to levy these Impositions, as they were called, was argued out between the royal and popular party in the Parliaments of 1610 and 1614, and the ground then taken up was maintained in all the constitutional arguments on either side up to the outbreak of the Civil War. In the later Parliaments of James' reign, those of 1621 and 1624, other matters occupied the attention of the Commons. But the accession of a new king gave the Commons the opportunity for which they were waiting, and they refused to make Charles the usual life-grant of tonnage and poundage for more than one year, pending an inquiry into the illegal customs exacted during James' reign. But even this modified grant was never passed; for the Bill was read over in the House of Lords, and its course was then stopped by the dissolution. In 1628 the Commons obtained the king's assent to the Petition of Right, which amongst other clauses stipulated that 'no man hereafter should be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common consent by Act of Parliament.' They intended to deal with tonnage and poundage in a separate Bill; but when the king refused to take it as a free gift at their hands, they anticipated their prorogation by a Remonstrance, in which they stated that 'the receiving of tonnage and poundage and other impositions not

granted by Parliament is a breach of the fundamental liberties of the kingdom and contrary to your Majesty's royal answer to their late Petition of Right.' This, however, was an indefensible position, for the Commons were themselves treating tonnage and poundage as a separate matter; and the king was technically in the right when he declared, on proroguing Parliament, that by the Petition of Right he had granted no new, but only confirmed the ancient liberties of the subject, and that as for tonnage and poundage, he did not intend to give away his right to levy it, nor could he in fact do without it. But the Commons' remonstrance was not without effect; for it encouraged the merchants to refuse payment of the impositions whether these were (a) the increased impositions exacted by James I and taken by the extraordinary power of the prerogative, since they had never been granted by Parliament; or (b) the tonnage and poundage which in the absence of a parliamentary grant Charles I claimed to belong to the Crown by prescriptive right. Charles and his Council, taking their stand on the decision of the judges in Bate's case, ordered the goods of those refusing to pay to be seized, and refused them any redress. Two cases in particular came up for trial. The first was that of *Chambers*, who, when imprisoned by the Privy Council, was released on a writ of Habeas Corpus issued by the Court of King's Bench. He was, however, prosecuted in the Star Chamber, and his appeal to the Court of Exchequer Chamber was in vain; for the judges informed him that the Star Chamber was erected long before the Statute of Henry VII to which he had appealed, and which, in their view, merely extended the powers of the Court. The plaintiff in the second case, *John Rolle*, was a merchant and also a member of the House of Commons, who joined with three others in an attempt to sue out from the Sheriff's Court of the city of London a writ of 'replevin,' which was used to regain property that had been illegally distrained. But the Court of Exchequer disallowed this as being an improper method of taking goods out of his majesty's possession. At the next meeting of Parliament, the second session of Charles' third Parliament, the Commons took their stand in Rolle's case on the narrow ground of breach of privilege, voting that such privilege extended to a member's goods. They attempted also to make a distinction between the king and his officers with a design of punishing

the latter; but the king took upon himself the responsibility for their actions. Before he could carry out his intended dissolution, the Commons, with locked doors, held the unwilling Speaker in the chair and passed resolutions condemning as enemies of the country all who should advise the levying of tonnage and poundage and all who should pay the same. During the eleven unparliamentary years which followed, the impositions continued to be levied with more or less resistance until, in 1641, the Long Parliament passed a Tonnage and Poundage Act conveying these duties to the king only for two months in return for the renunciation of all future claim to levy customs and duties of any kind without grant of Parliament.

At the Restoration the Customs were rearranged and were all granted to Charles II for his life. Finally, James II, on his accession and before the meeting of a Parliament, issued a proclamation for the levy and employment of the Customs just as if they had been granted to him. An excuse for this may be found in the natural derangement of the course of trade which would have resulted from the arrest of goods at the ports until the duties had been voted; but it was perhaps fortunate for James that his first Parliament was enthusiastically Tory and did not hesitate to grant him the Customs revenue of his predecessors, even augmented, for his life. All possible contest between Crown and Parliament over questions of taxation stopped with the Revolution.

Commis-
sions of
array.

There were *other forms of indirect taxation* more difficult to control because they were less tangible. Such were the old prerogative rights of Purveyance, Commissioners of Array and Distrain of Knighthood. The two latter may be easily dismissed. *Commissions of Array*, of which an account will be found elsewhere¹, only became a means of indirect taxation when the townships in which the troops were levied were forced to support those troops even though they were used on foreign service. In 1327, in answer to a petition of the Commons complaining of such an infraction of the Statute of Winchester, it was ordained that only in case of invasion should the 'gentz de commune' be called upon to arm themselves at their own expense. Further breaches of the law produced continual petitions, which resulted in a Statute in 1352, which was confirmed in 1402, and allowed that except in case of

¹ Chap. ix.

²⁵ Edw. III,
st. 5. c. 8.
⁴ Hen. IV,
c. 13.

invasion none should go out of their own counties, and that all who went on foreign expeditions should be at the king's charges from the day on which they left their own counties. But the abuse was not abolished. Henry V may have raised his victorious army by legal methods, but Edward IV and Richard III used any means ready to their hands. It was not that Commissions of Array were illegal in themselves, but that the method was illegally employed. It continued until the general question between King and Parliament had been settled at the Great Rebellion, when it was superseded by other ways of raising troops, and forbidden by the general attitude of the Commons towards all forms of taxation. *Distrain of Knighthood*, again, had originally fallen on all possessed of land to the value of £20 a year. Elizabeth and James I both levied money by this means, and raised the qualifying amount to £40 worth of land. In 1636 Charles I extended the system still further, till it lost all basis in history or reason; for he imposed the duty of knighthood or an equivalent fine on all owners of £40 annual income whether derived from land or otherwise. The Long Parliament included this among the many illegal methods of raising money which it abolished. The history of *Purveyance* demands more detailed treatment, and will best be dealt with in speaking of taxation¹.

Distrain of
Knighthood.

¹ Chap. x.

So far an attempt has been made to indicate the dates at which Parliament in general, and the House of Commons in particular, obtained a gradual acknowledgment from the Crown that the grant of all taxes lay with them. But the real control of the Commons in this important matter was gained not so much by direct prohibitory legislation, as by the establishment of three principles, whose acknowledgment by the Crown involved a practical surrender of all that the Commons demanded in this respect. These three principles may thus be regarded as *supplementary means by which the Commons obtained a control over the grant of taxation*. In the *first* place, they stipulated that, before they made their money grant, an answer should be given to the petitions of grievances which they had presented to the king. *Secondly*, they insisted on the appropriation of these grants to specified purposes; and *thirdly*, as a natural corollary, that

Indirect
methods of
obtaining
control over
taxation.

the accounts should be properly audited to ensure that this appropriation had been made.

¹ *Mid.
Ages*, iii.
162.

Mr. Hallam¹ has remarked that instead of the 'magnanimous boast that the liberties of England were bought with the blood of our forefathers . . . it is far more generally accurate to say that they were purchased by money.' Indeed, the money question has been a practical solution of otherwise insoluble questions of constitutional rights, and has placed a limit to disputed powers by translating them into a tangible form. From the earliest meeting of Parliament the presentation of grievances became an invariable preliminary to the discussion of a money grant; and, in order to ensure an answer to the petitions of the Commons, the grant was put off until the last day of the session. It may almost be said that in the early days of Parliament, constitutional progress really turned on the execution by the Crown of the conditions in return for which the supply had been granted².

² Stubbs,
*Const.
Hist.* § 289.
(1) Redress
to precede
supply.

For the supply was practically never refused, while the promises more often than not remained unfulfilled. But with the growing needs of the Crown came the opportunities of the Commons. The feeling that a grant should only be an answer to satisfied petitions can be first traced in the Parliament of 1339. It was most definitely implied in 1348, and again in 1373; and in the second Parliament of Henry IV, in 1401, a petition on this very point was presented to the king. On this occasion he emphatically refused the demand as contrary to 'the good customs and usages made and used of ancient times,' in other words, as without precedent. But the principle had been definitely formulated as a regular mode of action: it was 'one of the most distinct statements of constitutional theory that had been ever advanced' (Dr. Stubbs³); and the Commons, not to be baffled, soon afterwards adopted the practice of *delaying the grant until the last day of the session*. Indeed, the practical gain of the Commons may be measured by the history of the Lancastrian dynasty; for its failure was largely due to the fact that supply was absolutely necessary to the Crown, while the Crown had not the strength to carry out the redress which it had promised as a condition of the money granted. Until very recently a relic of this principle, that redress of grievances

³ *Const.
Hist.* § 306.

should precede the grant of supplies, was to be traced in the procedure of the House of Commons. The amount of money which is to be granted to the Crown is considered in the Committee of Supply, into which the whole House of Commons resolves itself for the purpose. But until 1882 it was in the power of any member, on the motion that the Speaker should leave the chair in order that his place should be taken by the chairman of the Committee, to move an amendment relating to any matter whatsoever. This practice was, however, curtailed by a standing order of the House in 1882.

But the Commons attempted to go a step further, and to ensure that the money granted should be applied to the purposes for which it had been demanded. Already in 1237 one of Henry III's ministers, William of Raleigh, had suggested that the Commune Concilium should appoint a committee with whom the grant when collected should be deposited. But the barons for some reason refused this most important concession, although one of their chief efforts in the struggle which followed was to wrest from the king the liberty of spending the money grants. Under Edward II all the powers of the administrative were for a time in commission; but no constitutional principle was established in the process. It was Edward III's squandered expenditure of the supplies so constantly demanded which first made it an important practical question that Parliament should determine not only the grant, but the way in which that grant should be applied. Nor did the king throw obstacles in the way. As a rule, at the opening of Parliament the members were told the objects for which money was specially needed, and for which Parliament had therefore been called together; and this explanation was often repeated to the Commons alone. It did not follow that the money was applied to the purposes for which it had been demanded of the Commons. Under Edward III no doubt 'the form frequently degenerated into mere verbiage.' Still the custom was useful; and during his reign a subsidy was frequently granted on condition of the continuance of the war. Under the Lancastrians, however, it may be said to have acquired the dignity of an accepted principle. Early in the reign of Henry V, tonnage and poundage was granted to the

(2) Appropriation of supplies.

king for life, and in 1453, if not before, it was appropriated to the navy. But like many other constitutional practices, this principle of the appropriation of supplies fell into disuse under the Yorkists and Tudors. It was reintroduced under James I in 1624, when the king himself suggested that the money granted for the succour of the Palatinate should be made over to commissioners nominated by the Commons; it became the custom under the Commonwealth, and under somewhat curious circumstances gained the recognition of Charles II. In 1665 a large vote had been made, with the proviso that it should be expended on the war with Holland. Clarendon, regarding this as an encroachment on the royal prerogative, offered a strenuous opposition, but Charles refused to support him.

(3) Audit
of accounts.

But the appropriation of supplies of necessity involved the audit of accounts, to secure that the intentions of Parliament had been carried out. Edward III granted this principle also in 1341, but the transitory character of the concession may be gathered from the fact that the Good Parliament of 1376 found it necessary to repeat the demand. On two occasions in the early years of Richard II (1377 and 1381), measures were taken by the nomination of treasurers to give effect to the practice; and from the latter date treasurers of the subsidies were ordinarily appointed, who should account at the next Parliament for all the money received and paid out. In 1379 the king, or rather his representatives, had actually taken the initiative and ordered the accounts of the previous subsidy to be presented in Parliament. Henry IV made one futile effort to defend his prerogative in this point. In 1406 he met a parliamentary demand for audit with the proud assertion that 'kings do not render accounts'; but in 1407 he thought it better to imitate the example of his predecessor and to lay the accounts before the Commons without further demand. The subsequent history of the principle of audit is to be found in the history of the previous principle of appropriation. Thus in 1666 Parliament followed up its victory of the previous year in the matter of appropriation by a demand for the appointment of a committee to inspect the accounts of the treasury. This, however, was prevented by a prorogation; and Charles intended to issue for the purpose a commission which he

himself would be able to control. The fall of Clarendon interrupted his design; and in the next year (1667), the Commons returning to the charge, forced the reluctant king to assent to a Bill appointing a committee of audit with extensive powers. One of its first results was the expulsion from the Commons of Sir George Carteret, the treasurer of the navy, for issuing money without legal warrant.

§ 34. The origin of the power of the Commons to a share in LEGISLATION is to be found in the immemorial right of every subject to petition the Crown for redress against a grievance. Such petitions were, by Edward I's direction in 1290, divided into five bundles according as they concerned the Chancery, the Exchequer, the Judges, and the King and Council, the fifth portion comprising those which had been already dealt with. Very shortly after the formation of the Model Parliament these petitions seem to have been presented to the assembled Parliament, one of whose first duties came to be the appointment of receivers and triers for their consideration. Finally, under Richard II, a division of these petitions was made into three portions, of which one went to the king, another to the Council, and the third was laid before Parliament itself. But they were all the petitions of individuals for redress of personal wrongs; and their parallel is to be found in the 'Private Bills' of modern Parliaments, Acts for local purposes, such as the regulation of fisheries and the enclosure of commons, or for the authorization of semi-public bodies, such as commercial or railway companies. The authority of the Commons in the initiation of legislation for the public benefit arose from the fact that the petitions of an organized and representative body, though not differing in theory from those presented by a private individual, not only dealt with subjects of general interest, but could be emphasized in a manner which of necessity placed them at once upon a different footing. Nor did this method of public petition begin with the Parliament of the three Estates. From the Articles of the Barons which formed the foundation of Magna Carta, on through the Petition of the Barons which resulted in the Provisions of Oxford (1258), to the twelve articles of the Parliament of Lincoln (1301), and the eleven articles of 1309, which led to the appointment of the Lords Ordainers, the same

Growth of
the power
of the
House of
Commons
in legisla-
tion.

principle was at work. In the two last cases the articles of redress, though probably drawn by the barons, were presented in the name of the whole community: while in all four instances the grievances were largely such as chiefly affected the classes represented by the Commons. But the attitude of the barons was essentially that of councillors of the Crown. It was only in moments of popular excitement that they assumed the function of petitioners on behalf of the community. The Commons, on the other hand, were essentially petitioners, and they took advantage of every occasion on which they were called together to accompany, and before long to precede, every grant of taxation with the presentation of a long list of petitions.

Treatment
of Com-
mons' pe-
titions by
the Crown.

At first there was little or no guarantee that these petitions would meet with any practical result. Even if the king so much as noticed any particular petition, he would give such a verbal and evasive answer as to this day is recorded in the formula 'le roi s'avisera' (the king will think about it), which would be used in an exercise of the royal veto. The question at issue was not of the Commons' *assent* to legislative acts. The necessity, or at least the advisability, of this was early recognized. The Act of 1322, which placed the assent of the 'commonalty of the realm' on a level with that of the 'prelates, earls and barons,' no doubt much overstated the fact; but it is not improbable that the Statute *Quia Emptores* was 'the last case in which the assent of the Commons was taken for granted in legislation' (Dr. Stubbs¹). Henceforth their share was at least such as was expressed by the formula 'ad audiendum et ad faciendum' (i. e. assent), which was inserted in their writs of summons to Parliament. But the Commons desired that their petitions should form the foundation of legislation, and were thus, unconsciously perhaps, aiming at encroaching upon that initiatory power which had hitherto been a monopoly of the Crown in Council. And until the reign of Edward III they were at the mercy of the king. It was the financial needs of that monarch, already alluded to, which gave the Commons the opportunity of making good the first steps in their progress towards legislative supremacy. This was recognized by the king himself, when he began the custom of declaring at the opening of Parliament, by the mouth

¹ *Const. Hist.* § 224.

of his Chancellor, his readiness to receive the petitions of his people. But this apparent readiness was by itself of little worth. It might at the best lead the king to give *some* answer to his suppliant Commons; but even if he caused their petition to be embodied in the permanent form of a Statute instead of the purely transitory and revocable Ordinance, it was easy for him to direct the judges, with whom at first lay the duty of drafting the measure, to omit the chief point of the petition, or to insert such a clause as would rob the whole statute of its value. Nor did the king stop here. There is only one case (1341) of the entire revocation of a duly enacted statute; but the prerogative power of dispensation, which will presently be dealt with, was scarcely less effective in reducing it to impotence.

The Commons attempted to intercept the king at every turn. They refused to grant supplies until they had received answers to their petitions: they even tried to make the grant upon conditions: they demanded that the royal answers should be formulated in writing and sealed before Parliament was dismissed. The royal method of nullifying enacted statutes was met with no less boldness and ingenuity. The Commons complained again and again of the non-observance of certain statutes, until it became a custom under Edward III to place first on the list presented to the king a petition for the ratification of the Great Charter. With the instinctive feeling that the assertion of principles was in the long run more important than the capture of a momentary advantage, they gave an *ex post facto* legislative sanction to many of the king's most arbitrary acts. And while thus protesting that all legislation should come through Parliament, in the Good Parliament of 1376 they capped it by a strong assertion of the power of Parliament alone to repeal a statute once enacted¹. But none of these measures proved really effectual. ¹ *Rot. Parl.* p. 368, § 44. Indeed, it was *their attitude as petitioners* which was at fault, and the only real remedy lay in the application of a new method of initiating legislation. Henry V replied to a petition of the Commons against the enactment of statutes without their consent, that 'from henceforth nothing be enacted to the petitions of his Commune that be contrary of their asking, whereby they should be bound without their assent'; but the

The Commons' measures of defence.

empty formula only witnesses to the evil for which the Commons were seeking a remedy. This they found in a method of initiation employed by the Crown, and thus transfixed the royal archer with an arrow stolen from his own well-provided quiver. It seems to have been the custom of the king, in order to facilitate the passage through Parliament of bills which originated with himself and his Council, to present them to the two Houses already drawn up in the form in which they were to appear upon the Statute Book. In order that the time of Parliament should not be wasted, the same privilege was extended to legislation in answer to the petitions of individuals. In the reign of Henry VI the Commons adopted the same form for matters of public importance, and by drawing up their petition 'formam actus in se continens' (i.e. in the form of a statute) they not only forced the Crown to submit every proposed alteration in it to their judgment, but left the king no alternative between acceptance or rejection of the measure as it stood. It has been pointed out that this new method of legislation by Bill 'really laid the foundation of the omnipotence of Parliament' (Sir W. Anson¹). For the first time it drew a strong line between the Administrative and the Legislature, and by transferring to the latter the power of initiation hitherto enjoyed by the Crown, it formed the first breach in the walls of that strong administrative fortress whose whole defences were not captured until the Revolution of 1688.

¹ *Law and Custom of Const.* i. 234.

Hindrances to the Commons.
(1) Attitude of the Lords;

But it was only the first breach, and that of not very serviceable dimensions. Time alone could show its value. For a long while yet there were hindrances to the complete exercise of this power of initiating legislation by the Commons. They had not to fear the king alone. All the other Estates were jealous. The *Lords* were not only an Estate of the realm; they were also hereditary councillors of the Crown. They had also been organized in the legislative body of the Commune Concilium long before the Commons had appeared upon the scene. Although occasionally they seem to have joined the Commons as petitioners, laws were at first enacted with their counsel and assent; and for the first century after the incorporation of the Commons in Parliament, the Lords must in their attitude towards legislation have acted rather as royal councillors, debating the petitions of the Commons and advising the king

as to his answers, than as an Estate of the realm with only at the most a concurrent power of initiation with that claimed by the representative body. The attitude of the *Clergy* was also doubtful. They had their own organization in Convocation, with certain powers of separate legislation. By the middle of the fourteenth century they alone shared with the Commons the control of the purse. Moreover, while the Lancastrian House posed as the champions of orthodoxy, the Church was throwing herself more and more for protection on the Crown. There was great cause for fear lest the king should by secret negotiations use them, as he had used the Pope and the body of merchants, to checkmate the Commons. And to judge from petitions presented by the Commons in 1344 and 1377¹, it would seem that the king had occasionally legislated in conjunction with the clergy without submitting the resulting statutes to Parliament for approval. It is possible also that clerical protest against contemplated parliamentary legislation, although often a matter of form, may sometimes have influenced a decision of the Commons. But the clergy stood completely apart from parliamentary struggles, and wisely followed the lead of the Commons. As a result, they were unmolested save for an occasional suggestion from the Lollard members for the confiscation of their revenues, and were even allowed to continue until the Restoration voting their contributions to the State in their own assembly of Convocation.

(2) of the
Clergy;

¹ *Rot. Parl.*
ii. 149, § 8;
368, § 46.

A far more real hindrance to the legislative power of the Commons than any offered by the Lords or the Clergy, came from the necessary attitude of the king. At a time when Parliaments were intermittent, meeting sometimes after an interval of several years, it was absolutely needful that the administrative should be armed with the power of temporary legislation. Moreover, before the advent of Parliament, the king with his Council had been administrator and legislator in one. All early legislation was intended to meet a temporary emergency. The frequent recurrence of similar circumstances would cause such a temporary enactment to assume a permanent form. Thus there was no reason why the king should distinguish in his Ordinances, issued with the advice of his Council, between the assertions of a general principle and the satisfaction of a momentary need. The only recognition of

(3) of the
Crown by
(a) Ordi-
nances.

a difference is to be found in the submission of those more important matters, which under Henry II were embodied in the form of Assizes, to the formal assent of the Commune Concilium. It is probable that the first real attempt to distinguish between temporary and permanent legislation dates from the arrangements made by Edward I for the sorting of petitions, and the existence of this difference was marked by the submission of those of more general interest to the consideration of the assembled Parliament. Then when Parliament itself began to petition, necessarily on matters of national importance, it was impossible to ignore the fact that the legislative power had become something more than a mere stop-gap. The Assizes of Henry II, and the Provisions of Henry III, gave way to the Statutes of Edward I; but it was entirely against the king's interest to allow any hard-and-fast distinction between the binding force of an Ordinance and of a Statute respectively. Indeed, Edward I seems to have succeeded so well in his endeavour to prevent this, that not only from his time had the royal Ordinances 'been allowed to have very much the same force as the statutes themselves,' but 'until the great renunciation of the right of Parliament in 1322, it might be questioned whether those Ordinances were not laws within the letter of the constitution, and the acquiescence of the Parliaments might be reasonably construed as an admission of the fact' (Dr. Stubbs¹). It was probably the extreme shiftiness of the king's conduct in his method of dealing with their petitions, that caused the Commons to emphasize the difference between the temporary and the permanent form. Here, as in the companion matter of taxation, the reign of Edward III supplied the Commons with abundant opportunity; and the free use of the royal Council to evade the answered petitions of Parliament brought out clearly the essential difference between the king's method of action in his Council and that form of legislation which was soon to be appropriated by Parliament itself. So long as the Commons remained in the position of petitioners it lay largely with the king whether his answers to the petitions should be couched in the form of Ordinance or of Statute. In 1363, on a reference of the matter to the Commons themselves, they chose the form of Ordinance² as giving more opportunity for modification in the

¹ *Const. Hist.* § 259.

² *Rot. Parl.* ii. 280, § 39.

future. On the other hand, when in 1353 the Ordinance of the Staple was sanctioned by a Magnum Concilium which contained an imperfect representation of the Commons, the protests of those who were present forced the king to summon a properly constituted Parliament for the next year in order to convert it into a Statute. The result of these struggles was to deepen the growing distinction between the Administrative and the Legislature, and to emphasize the difference between the method of operation pursued by the king-in-Council and that which was alone worthy of the sovereign body of the realm, the king-in-Parliament. Thus while a Statute was 'a law or an amendment of law, enacted by the king-in-Parliament and enrolled in the Statute Roll, not to be altered, repealed, or suspended without authority of the Parliament, and valid in all particulars until it has been so revoked'¹—in other words, ¹ Stubbs, *Const. Hist.* § 292. a legislative Act intended to be perpetual in operation, the Ordinance became essentially the act of an administrative body, devised to meet a temporary emergency. How far the upholders of the royal prerogative were still willing to press the efficacy of this latter power may be judged not only from a petition of the Commons in 1389, praying that the Council may not, after Parliament has dispersed, make any Ordinance contrary to the Common or Statute Law², but also from one of ² *Rot. Parl.* iii. 266, the charges against Richard II on his deposition, that he had § 30. maintained that the laws were in his mouth and often in his breast, and that he alone could change and frame them.

The particular parliamentary tenure of the Lancastrians, ^{Proclamations.} followed by the entire abeyance of Parliament under the Yorkists and early Tudors, caused a suspension of the rivalry between Statute and Ordinance. When the reinstatement of Parliament might naturally be supposed to revive it, Henry VIII checked it by actually employing Parliament itself to wipe out the distinction which alone gave it power as ^{Under the Tudors.} a legislative body. The exact force of the Statute of Proclamations (31 Henry VIII, c. 8, 1539) has been much disputed. It enacted that the king's Proclamations (as Ordinances were now called), made with the assent of his Council, 'should be observed and kept as though they were made by an Act of Parliament.' A proviso was added to the effect that such proclamations must not be 'prejudicial to any person's

inheritance, offices, liberty, goods and chattels,' or infringe the established laws; and this has been construed as an attempt of the Commons to limit a power which was in any case certain to be used illegally. However that may be, the statute was repealed in the first year of Edward VI's reign. Proclamations, however, were continually used and enforced by all kinds of penalties, such as fine, imprisonment, and even labour on the galleys. They were issued by the Council and their breach was taken cognizance of by the Star Chamber, so that they in reality created new crimes unknown to the law of the land. Thus, in *religious* matters, the Council of Edward VI ordered justices of the peace to 'commit to the galleys sowers and tellers abroad of vain and forged tales and lies' (1549): Mary denounced the penalties of martial law against the possessors of heretical books: Elizabeth by this means banished Anabaptists and Irish from the country. In the *economic* sphere, Edward's Council regulated the price of provisions; Mary imposed duties on foreign cloth and French wines, while Elizabeth prohibited the cultivation of woad, the exportation of corn and money, and the building of houses within three miles of London. Already in the reign of Mary the legality of these proclamations was disputed, and the judges carefully limited their use to the exposition of existing law. 'The king,' they said, 'may make a proclamation *quoad terrorem populi* to put them in fear of his displeasure, but not to impose any fine, forfeiture or imprisonment; for no proclamation can make a new law, but only confirm and ratify an ancient one.'

Under the
Stuarts.

But this plain statement deterred neither Elizabeth nor her successor from the use of proclamations. Indeed, under James they were so numerous—being issued to forbid the election of outlaws and the inclusion by the sheriff of ancient or depopulated towns in the first Parliament of the reign; to interfere with freedom of trade by the levy of new customs duties unsanctioned by Parliament; to prohibit the increase of London, and to enforce the residence of the gentry in the provinces—that in 1610 they called forth the remonstrance of Parliament. James in answer claimed the right in cases of emergency, during the abeyance of Parliament, of issuing proclamations which went beyond the law. He promised, however, to consult the judges; and the matter was submitted

to Chief Justice Coke and three others, who, despite the utmost pressure of the Court, decided (*a*) that the king by his proclamation cannot create any offence which was not one before; but he may for the prevention of offences, admonish his subjects to keep the law, and the neglect of such proclamation aggravates the offence; thus, they add, if an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so: while in answer to the royal claim to override the existing law, they asserted (*b*) that the king has no prerogative except what the law of the land allows him. This may be said to sum up the whole question at issue between King and Parliament in the seventeenth century. James did not publish the decision; but probably no subsequent proclamations were issued which imposed penalties such as fine and imprisonment. In some form, however, proclamations were still in use, and so long as the Star Chamber lasted, it did not hesitate to inflict a penalty where none had been legally applied.

But it is a weakness of the English Constitution, though with many compensating advantages, that the administrative is only able to act within the limits of the law of the land. If ministers step outside the law, they do it at their peril; and moments of emergency find them shrinking from the responsibility which they incur by intruding into the special province of a most jealous assembly. Thus in 1766 the ministers, in what is known as Chatham's Second Administration, being desirous of meeting beforehand the distress which would be occasioned by the bad harvest, issued two proclamations—one for the revival of certain old economic regulations against forestallers and regraters, which being a reminder of existing law fell within the definition of the judges; another, which directly annulled the existing law for the free export of corn by laying an embargo on all ships laden with wheat. The only defence which the ministers could make was the necessity of immediate action: the proclamations were withdrawn, and Parliament was with difficulty persuaded to pass an Act of Indemnity. Such, then, is the only method of action possible to an English minister. He must on an emergency imitate Luther's motto, 'Pecca fortiter' (i.e. break the law boldly), and the safeguard against rash action on his

Their
modern
use.

part is the knowledge that his acts must be subsequently covered by an indemnity from Parliament, whose judgment, moreover, will be pronounced after the event.

(b) The dispensing power.

The last hindrance to be noticed to the full exercise of the power of legislation by the Commons arose from the royal claim to dispense with, or even entirely to suspend, the operation of particular statutes. The claim was founded on the view of the king as the supreme and sole lawgiver. The maker of the laws, it was argued, could either dispense with their operation in individual cases, or even unmake them altogether. No one questioned the royal right of pardoning a criminal; and if the king could remit a punishment after sentence had been passed, much more should he be able before sentence to release a law-breaker from the consequences of his act. The philosophical historian might find a justification for the exercise of this power of the prerogative in the probable hardship which must often ensue in individual cases from the hastily drawn and crudely expressed statutes of a mediaeval Parliament. But the whole endeavour of the Commons was, as we have just seen, to substitute the king-in-Parliament for the king-in-Council as the supreme legislative body; while all the available evidence goes to prove that the power of dispensing with the laws in individual cases was used rather to forward the private aims of the king and those who could influence him, than to remedy the inequality of the laws in the interest of justice. In one of the four Parliaments of 1328 the Statute of Northampton restricted the royal prerogative of dispensation. But yet, in

¹ *Rot. Parl.* 1330, in 1347, and again in 1351¹, the Commons petitioned against the use of this power for the issue of charters of pardon, ii. 172, § 62; 229, § 26.

or rather of licence beforehand to a large number of common malefactors. Indeed these stand side by side with the frequent petitions against the sale of writs in Chancery and the extended jurisdiction of the Council. Another statute, of 1390, prohibits the indiscriminate grant of pardons. But the exercise of this necessary right was a matter of discretion, which could not be regulated by statute. Accordingly, the law courts set to work, and the great judges of the Lancastrian time drew a distinction between *mala in se* or violations of divine law, such as murder and robbery, in which cases they denied the royal power of dispensation, and *mala prohibita* or

crimes created by statute, where they thought the king's power to hold good. They further denied the lawfulness of the power when exercised against Common Law crimes, i. e. those in which the original Common Law had been confirmed by statute, or against the rights of individuals or corporations. In short, the king's prerogative was unable to set at nought the moral law, or to pardon one man for an offence against another. The king could only use his power to excuse an injury against himself or an illegal act from which no one had derived any harm. But the majority of the Stuart judges set aside these subtle distinctions, and decided the whole matter from the standpoint of divine right. Thus in the test case of *Godden v. Hales* (where a Roman Catholic officer pleaded a dispensation from James II for his omission to take the oaths of supremacy and allegiance and to receive the sacrament according to the rites of the Church of England, as the Test Act required), all the judges but one decided in favour of the king's power, because the kings of England are sovereign princes; the laws are the king's laws, it is therefore an inseparable part of his prerogative to be able to dispense with particular laws in particular cases: of the need of such dispensation the king was the judge; and finally, this is an ancient remnant of the prerogative of the king and cannot be taken away from him, since it is not a power given him by the people. This was simply to exalt the royal authority above all law, and it is a marvellous testimony to the self-restraint of the authors of the Bill of Rights that, instead of denying the dispensing power altogether, they contented themselves with a condemnation of its illegality 'as it hath been assumed and exercised of late,' and with a declaration of its future invalidity unless Parliament had made provision for such power in the terms of the statute so violated. As a result, apart from the licence of Parliament itself, the only lawful dispensations are such as may have been granted before James II and were not covered by the words of the Bill of Rights. Cases of these are so few as to be of no practical importance.

But if the philosophical historian could discover some justification for the exercise in mediaeval times of the dispensing power on behalf of an individual, he would find nothing to urge in favour of the claim to suspend the operation of a statute in the case of a whole class; for this was nothing else

(c) The suspending power.

than to nullify the law. Yet the exercise of this power was by no means unknown. The earliest instance was probably the omission from the reissue of the Great Charter in 1216 of those financial and constitutional clauses which were among its most valuable gains. But the circumstances were exceptional. The employment of this power has in almost every instance been connected with religious causes. Before the Reformation, it was in favour of the Pope as against the statutes by which an angry Parliament prohibited papal taxation and interference with the rights of patronage; after the Reformation, the Stuart kings used it to shield the Roman Catholics from the penal laws which expressed the political as much as the religious danger apprehended by the country from the partisans of Rome. Under James I and his son, Parliament remonstrated frequently against the non-execution of the Recusancy Laws, as they were called. But their foreign policy as well as their natural inclinations dictated to these kings their line of conduct, and the results of their leniency were not serious. It was under the later Stuarts that this power assumed dangerous proportions. Charles II's Declarations of Indulgence had to be withdrawn; but James II, acting on the opinion of his prerogative set forth by the judges in *Godden v. Hales*, not only issued a Declaration by which he 'immediately suspended . . . the exercise of all and all manner of penal laws ecclesiastical, for not coming to church, or for not receiving the sacrament, or for any other nonconformity to the religion established,' but he even commanded that it should be read in the parish churches. The trial of the seven bishops who petitioned against it, and their triumphant acquittal, sounded the knell both of James' tenure of the throne and of the interpretation which he had put on the royal power; and the first clause of the Bill of Rights condemns as illegal 'the pretended power of suspending the laws or the execution of laws as it hath been assumed and exercised of late by royal authority, without consent of Parliament.'

Control of
the general
administra-
tion by the
Commons.

§ 35. The attempt of the Commons to obtain control over the two most important functions of government—the enactment or amendment of laws and the assessment of taxes—practically involved an interference in every department of governmental action. The extent to which this was carried may be gathered from the subjects of the numerous petitions

which were presented by every Parliament to the king. Despite their many merits, we may set aside the Articles of the Barons in 1215, and the Petition of the Barons in 1258, as being largely occupied with old grievances arising from the undue exercise of feudal rights and the influence of aliens on the Crown. The best early instances of petitions of national importance are to be found in those presented in the Parliament of Lincoln in 1301, the Parliaments of 1309 and of 1341, and above all in the Good Parliament of 1376. An analysis of the hundred and forty petitions which emanated from the latter seems to prove that no point of national administration was considered as outside the supervision of Parliament. The directly feudal grievances have disappeared; but it is still, and for a long time remains, necessary to protest against the abuses of purveyance, the jurisdiction of the Courts of the Steward and the Marshall, the method of appointing Sheriffs. The presence of the Commons has placed in the forefront some comparatively new questions, such as the Pope's interference in the National Church, the freedom of election to Parliament, and all matters connected with the regulation of labour. A general survey of the petitions seems to show 'that the government was ill administered rather than that any resolute project for retarding the growth of popular freedom was entertained by the administrators' (Dr. Stubbs¹). And herein lay the danger of the situation. It has been remarked that 'half the struggles of the Middle Ages originated in the uncertainty of the line drawn between the executive and the legislative².' For the king had been trained to regard the country as a property to be administered for his own benefit; while the legislature sought a real instead of merely theoretical power. Consequently, while the former resented any interference with his prerogatives, the latter, not knowing where to stop, claimed such purely executive functions as the election of ministers, the regulation of the royal household, and the summons of Parliament. The struggle resolved itself into a contest for the sovereign power in the State, and will be dealt with in the next chapter.

But in fairness to the Crown it must be said that, however minutely the Commons inquired into the details of administration, they *shrank from direct responsibility*. This may be

¹ *Const. Hist.* § 262 end.

² *Cf. Ibid.* § 295 end.

(1) Foreign politics. illustrated in two departments. The last point on which a popular assembly would be qualified to judge would be in the matter of *foreign politics*. Nor were the Commons asked to do so, until Edward III, in want of their money, sought to implicate them in his warlike projects. At first they were lavish in their grants and seem to have been prepared to share the responsibility for war with the king. In 1338 Edward asserted that his expedition was made not only with the assent of the Lords, but at the earnest request of the Commons. This may have been the turning-point; for in the very next year (1339) the Commons declared that they were not bound

¹ *Rot. Parl.* to give advice on matters of which they had no knowledge ¹.
ii. 105, § 11. In 1348 they made their ignorance and simplicity a plea for declining to express an opinion, and referred the king to the

² *Ibid.* ii. advice of the great and wise men of the Council ². In 1354 they
165, § 5. replied to a request for their opinion on the pending treaty, that

³ *Ibid.* ii. 'whatever issue the king and the Lords might please to take of the
262, § 58. said treaty would be agreeable to them ³.' Under Richard II they

⁴ *Ibid.* iii. pursued a similar course, referring the question of an expedition
145, § 9. in 1382 to the Lords ⁴, and in 1384 trying to make out that

⁵ *Ibid.* iii. the French war was a personal quarrel of the king ⁵. But the
170, § 16. grudging nature of the supplies voted, and the attempts to

establish the principles of appropriation and audit, sufficiently proved the distrust of a warlike policy which Edward III's extravagance had implanted in them. The changed position of Parliament under the Lancastrians made the Commons bolder in the matter of accepting responsibility. They supported Henry V's war as loyally as their predecessors in the early years of Edward III. They joined in the ratification of the treaty of 1416 between Henry and the Emperor Sigismund, and in the treaty of Troyes in 1420; while in 1446 they consented to the repeal of that article in the latter which required the assent of Parliament to any treaty of peace between the two kings. Foreign politics were among the subjects with which the Tudor and Stuart sovereigns forbade Parliament to meddle. There was much to be said for their contention; but it was the anti-national attitude of the Stuarts which forced Parliament to take part in a discussion for which they were of necessity insufficiently provided.

A second illustration of the timid conduct of the early

representatives of the Commons is found in their attitude towards *judicial matters*. A celebrated article of Magna Carta (§ 40) had made the king promise that he would not 'sell, deny or defer right or justice.' It was in their desire to maintain this that the Commons found their justification for the review to which they subjected the action of the law courts. The king, moreover, invited their participation in judicial questions; and it became very usual for the Chancellor in opening Parliament to demand on behalf of the Crown the advice of the Estates as to the best means of maintaining the public peace. In response to this request the Commons, from the early years of Edward III's reign to the dark days which preceded the Wars of the Roses, never ceased to point out in their petitions the administrative abuses which stood in need of reform—the indiscriminate sale of writs in Chancery for the authorization of all kinds of illegal acts; the interference of the Privy Council with the ordinary course of the law; the extension of the jurisdiction of the Courts of the Steward, the Constable, and the Marshall beyond the limits imposed on them by the *Articuli super Cartas* (1300); the attempted revival of the old feudal jurisdictions supported by the extensive practices of livery and maintenance; the corrupt conduct of the judges of assize and the sheriffs. These complaints were not coupled with demands for new legislation; they were merely petitions that the existing laws should be justly administered. But the Commons never aimed at direct judicial authority. It seems as if they shrank from the responsibility which it would entail; for, although instances are to be found in which the Commons listened to the complaints of individuals against great officials, the fact that most ministers were peers gave their trial of necessity to the House of Lords, while the Commons' attitude of petitioners determined the part which they should play in an impeachment as accusers before the natural judges. Indeed, on the deposition of Richard II, the Commons once for all repudiated for themselves the position of judges. Once or twice since, in moments of passion, as in the case of *Floyd* (1621), whom they ordered to pay £1000 and to be put in the pillory for expressing delight at the defeat of the Elector Palatine; and again in the case of *Mist* (1721), a printer whom they committed to Newgate for publishing a journal in which some hope was expressed for

the restoration of the Stuarts, the Commons have violated their own principle, and have arrogated to themselves the functions of a law court. Otherwise, their only judicial authority has been exercised merely in cases of breach of privilege, which will presently demand notice.

The supervision of the Commons over the general administration was of little effect so long as they were unorganized and the ministers were in every sense the servants of the Crown. It was not until the discovery of the system of government by a Cabinet, acting in the interests of the dominant party in the Lower House of Parliament, that a real and effective supervision of the administration was secured to the House of Commons. It remains to be proved whether the present system of minute interference does not impose an impossible burden on the ministers to whom it is applied, and deprive them of that personal sense of responsibility which is necessary to draw out all the greatest qualities of a first-rate administrator.

The Commons protect themselves against the Crown, by

§ 36. The progress of the Commons was threatened from two sides. We have already noticed the methods by which the *Crown* sought to preserve a subservient Parliament. The Commons fortified themselves against these insidious attacks, partly by trying to provide for regular meetings of Parliament, partly by the assertion of privileges without which no member was able to act freely. No less necessary was it for the Commons to define their position in relation to the *House of Lords*. The two Houses had plenty of common interests, but the older and socially superior body struggled to maintain its political position.

(1) Fixing the meeting of Parliament.

The *time of year* at which Parliament should meet was governed by non-political considerations. It was a combination of three determining causes. The charters of Anglo-Saxon Witanes are dated at the *great Church Festivals* of Christmas, Easter and Whitsuntide, a custom which was imitated by the Norman kings in their three crown-wearing seasons at Winchester, Westminster and Gloucester respectively. But one of the chief duties of the Commune Concilium was the decision of judicial matters, and since the *legal terms*, derived from the Roman divisions into 'dies fasti' and 'dies nefasti,' had been made to coincide with the festivals of the Church, this custom was maintained; while the lawyer element

which early predominated in Parliament, ensured the continuance of so convenient a time. The greatest determinant, however, in the Middle Ages was the *Harvest*, during which the schools and law courts were closed, and not only was Parliament prorogued or adjourned, but even civil war was suspended.

All other matters connected with the summons of Parliament rested with the king and his councillors. Thus, although the assembly was ordinarily held at Westminster, special circumstances often caused its summons elsewhere, as when the Scotch wars made it convenient for the king that Parliament should meet at York. As a matter of fact, most of the great towns were chosen in turn, but there was always some temporary reason for a deviation from London. Again, in 1258 the Provisions of Oxford had directed the calling of three Parliaments every year¹, on the analogy of William I's three crown-wearing assemblies. These were baronial councils for discharging the judicial functions of the Commune Concilium, and as such they were maintained by Edward I. But for the summons of a Parliament of the three Estates this was far too often. For while, on the one side, the Commons felt representation to be a burden, and regarded frequent summonses merely as frequent demands for money, the King, though he wished to get the money as often as he could, yet did not care to hear the grievances of the assembled nation more often than he was obliged. Thus while at ordinary times it was with the greatest difficulty that any one could be induced to undertake the function of a member of Parliament, in moments of popular excitement demands were made for annual assemblies, and the provision of the Ordinances in 1311², followed by Acts of the Parliaments of 1330³ and 1362⁴, established annual Parliaments as the rule. But how little the king felt himself bound by these enactments is clear from the numerous exceptions to this rule. Under Edward III the expedient was discovered of voting supplies for two or three years in advance; while, as Parliament advanced in power, a wealthier class of persons was willing to be returned as members. They were not in such haste as their poorer predecessors to return to neglected businesses; sessions could become longer and prorogations more frequent. Thus more business was despatched; larger supplies were voted; and it was not so necessary to call

Duration
of Parlia-
ment.

¹ *Sel. Chart.*
p. 392.

² *Rot. Parl.*
i. 285, § 29.

³ 4 Edw.
III, c. 14.

⁴ 36 Edw.
III, c. 10.

Parliament every year. The Acts of 1330 and 1362 provided for the summons, if necessary, of more than one Parliament in the course of the same year. In 1328 no less than four assemblies had been called. In 1332 and in 1340 Parliament came together three times within the twelve months, and twice in 1334 and again in 1352. But as each assembly was preceded by a fresh election, and the members were paid according to the number of days on which the Parliament sat, these frequent sessions were so unwelcome as to occasion a petition in 1380 from both Houses that they should not be called together for another year¹.

¹ *Rot. Parl.*
iii. 75, § 17.

Triennial
Act.

The occasional intermission of Parliament passed on the accession of the Yorkists into a regular principle, and was only rescinded when Henry VIII desired the co-operation of the people in his religious changes. The evident intention of the Crown until Charles I to return to the custom of the Yorkists, caused the Long Parliament in February 1641 to pass the *Triennial Act* (16 Car. I, c. 1) which provided that a Parliament should be *ipso facto* dissolved after three years from the first day of its session; and that if the king neglected to call another for three years, the Chancellor, or failing him the peers, or in the event of their neglect the sheriffs and mayors might issue writs, and if all officials failed in this duty, the electors themselves should proceed to choose representatives: while, except with its own consent, the new Parliament might not be prorogued for fifty days. The Act, which had already been broken by the Long Parliament itself, was repealed after the Restoration, coupled however with a recommendation that Parliament should not be intermitted for more than three years at a time. The practical uselessness of this provision was proved by the existence of the 'Pensionary Parliament' of Charles II for seventeen years. Yet the authors of the Bill of Rights contented themselves with the assertion that 'for the redress of grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.'

Septennial
Act.

It was not till 1694 that the second *Triennial Act* (6 & 7 Will. and Mary, c. 2), which William had vetoed in the previous year, passed into law: while in May 1716, under circumstances to be related elsewhere, this limit was by the *Septennial Act* (1 Geo. I, st. 2, § 38) increased to seven. Numerous have

been the attempts in the present century to effect its repeal; some, like those of the Chartists, in favour of annual Parliaments, some for a mere modification of the present length. Custom has reduced the time to an average of about six years duration, and the apprehensions roused by the coming election take off almost another year from the effectiveness of the work done by the House of Commons. Until 1696 the demise of the Crown put an end to the existing Parliament; but an Act of that year provided that it should continue for six months after the death of the reigning monarch, while an Act of 1797 revived the old Parliament for six months in the event of the monarch's death just after its dissolution. Finally, by the Representation of the People Act (1867), no dissolution of Parliament is necessary at future demises of the Crown.

§ 37. The second method by which the Commons have tried to protect themselves against the direct attacks of the Crown, is the assertion and maintenance of PRIVILEGES OF PARLIAMENT. Since the reign of Henry VIII it has been the custom, at the commencement of every Parliament, for the Speaker to demand from the Crown on behalf of the Commons a confirmation of 'their ancient and undoubted rights and privileges.' But these privileges are not regarded as in any sense depending on a grant from the Crown; and an assertion of the attitude of the House in this respect still survives in the custom of taking the first reading of some Bill before it enters on the discussion of the speech from the throne. The Speaker then claims in particular for the members of the House 'that their persons and servants might be *free from arrests* and molestations; that they may enjoy *liberty of speech* in all their debates; may have *access to her Majesty's royal person* whenever occasion shall require: and that all their proceedings may receive from her Majesty *the most favourable construction*.' But beyond these privileges the House has acquired certain rights necessary for the proper maintenance of its dignity, but not claimed in words from the Crown. These have been most carefully enumerated (Sir W. Anson) as the right to *provide for its own constitution*; the right to *exclusive cognizance of all that takes place within the House*; and the right of *inflicting punishment for breach of privilege*¹. Many of these will be found to include lesser rights which, in process of time, have grown out of them.

(2) Asserting privileges of Parliament

¹ Law and Custom of Const. i. 156 et seq.

Formal
privileges.

Of the first set of privileges—those demanded by the Speaker—two are purely formal. ‘The most favourable construction’ has been described as ‘not a constitutional right but a personal courtesy’; for while, on the one side, the Crown can take no notice of anything said or done inside the House, on the other side the right of freedom of speech affords sufficient guarantee against any active interference with members of the Commons. It does not, however, follow that in the days of the greater personal influence of the Crown, this demand was useless in its effects. Again, although ‘the right of access to the Crown’ is only enjoyed collectively by the whole House, yet all members of the Commons who are Privy Councillors are as much entitled as are the peers, to a personal audience of the monarch.

Freedom
from
arrest.

Far different was it with the first two rights claimed by the Speaker. The claims made under the heads of freedom from arrest and liberty of speech affected not merely the attitude of Parliament towards the Crown, but even the relations of the House of Commons towards their constituents. For after the Revolution of 1688, when Parliament had won its victory over the Crown, it employed those very privileges which had defended its integrity against the arbitrary attacks of the monarch, to secure the fruits of the victory to a narrow oligarchy, by warding off all criticism and supervision on the part of the people whom its members were supposed to represent. Both these privileges were in course of time considerably extended. Thus, the recognition of *freedom from arrest* has been dated

¹ *Sel. Chart.*
p. 61.

² *Ibid.*

p. 74.

Extension
of the
privilege.

back to a law of Æthelberht¹ at the end of the sixth century, while Cnut certainly extends his special protection over those going to and from the ‘gemot.’² Indeed, it was a necessary precaution to ensure the safe arrival and departure, and the regular attendance of members. But the extent of the privilege was most indeterminate. In the first place, it is mere prescriptive custom which has fixed the time spent ‘eundo’ or ‘exinde redeundo’ at forty days each. Such was allowed in the case of Mr. Duncombe (1847), and has been indirectly confirmed by several Acts of Parliament. But the Lords claim only twenty days; and there are cases in the sixteenth century (Pledall 1555, Marten 1586) which seem to show that only twenty days or even less were then thought sufficient for the Commons. In the next

place, the privilege seems from its earliest recognition to have (2) been held to *include the servants and the estates of members*. This extension was confirmed by statute (5 Hen. IV, c. 6) in the particular case of *Richard Chedder*, a member's servant who had been assaulted, and generally in an Act of 1433 (11 Hen. VI, c. 11). It was also applied to *exempt* those who claimed it *from* (3) *legal arrest* and from being impleaded in civil suits. The former was asserted in the cases of *Clerk* (1460), *Atwyll* (1477), and *Ferrers* (1543), members, and those of *Lark* (1429) and *Smalley* (1575), servants. Finally, the celebrated case of *Sir Thomas Shirley* (1603) was followed by the first distinct legislative acknowledgment of the right of freedom from arrest (1 Jas. I, c. 13). The privilege of *not being impleaded in civil suits* seems to have been acknowledged as early as 1290; and, despite some instances under Edward IV to the contrary (Walsh, Cosyn, 1473), it was successfully claimed as a prescriptive right in the case of *Atwyll*, already quoted, and was maintained either by writs of 'supersedeas,' such as those issued by Edward II in 1314 to stay all actions against members in their absence, or in the seventeenth century by a letter of the Speaker to the judges to the same effect. Members sometimes waived the privilege, and the law courts did not always let it go unquestioned (case of *Hodges and Moore*, 1726); but it was sufficiently obnoxious to the course of justice to necessitate its removal by legislation. A series of statutes, commencing in 1700 (12 & 13 Will. III, c. 3) and ending in 1770 (10 Geo. III, c. 50), first allowed actions to be begun against any person entitled to privilege in the principal courts of Common Law and Equity at certain times, such as a dissolution, prorogation, or an adjournment for more than fourteen days. They then extended this right of trial to all courts of record, and finally not only allowed any action to be tried *at any time* against privileged persons, but withdrew the privilege of freedom from arrest and imprisonment from their servants, saving it only for the persons of the members themselves. Yet to this day the Speaker claims immunity for the servants of members, and it has been conjectured (Sir E. May¹) that it might still be asserted for servants in actual attendance on members at the House. Until 1853 the Speaker also claimed immunity for the estates of members; but the Commons wisely waived the right, and

¹ *Parl. Practice*
8th ed.,
p. 65 note.

the word was for the future omitted from the demand. It is perhaps a natural extension of the privilege which releases out of custody for a civil action, a member elected while he is under restraint. Finally, privilege of Parliament was held to

- (5) include freedom from the necessity of obeying a subpoena to serve as a *witness*, and from the liability to *jury* service. The first claim does not seem to have arisen until the end of the sixteenth century; it was only with some difficulty established, and has now been waived: the latter has been more willingly allowed by the law courts, and now rests upon a statute of 1870 (33 & 34 Vict. c. 77, § 9).

Exceptions. Side by side with these extensions should be set certain

- (1) *exceptions* to the privilege. Thus freedom from arrest has never been held to apply to a member charged with *treason, felony, or breach of the peace*. It is limited to civil causes. This was laid down by the judges in Thorpe's case (1453), and was recognized by more than one resolution of the House itself (1675, 1697).
 (2) Again, by an Act of 1849 (12 & 13 Vict. c. 106), *bankrupt* members were exempted from arrest during the period of their privilege; but by the Bankruptcy Act of 1869 this temporary protection was withdrawn. In 1763 both Houses, in the case of Wilkes, resolved, despite the contrary decision of the Court of Common Pleas, that 'privilege of Parliament does not extend
 (3) to the case of writing and publishing *seditious libels*'; and this seems to have carried with it the principle 'that privilege is not claimable for any indictable offence.' Finally, the privilege has been held not to extend to a member committed for *con-*
 (4) *tempt of court*. The point was for some time doubtful, but was decided in the negative by a Committee of Privileges appointed to consider the case of Mr. Long Wellesley in 1831, and their opinion has been confirmed in a number of subsequent cases.

Means of
enforcing
the privi-
lege.

The assertion of a privilege was of little use unless it was backed up by adequate means of protection and enforcement. These were of various kinds. At first, in the case of members actually under sentence, in order to avoid undue injury to the plaintiff, it was usual to pass special statutes authorizing the Chancellor to issue writs for their release: while, if a member was merely awaiting his trial in custody, a writ of privilege issued from the Chancery was deemed sufficient. In the exceptional case of *Thomas Thorpe*, the Commons even called in

the assistance of the House of Lords. But in 1543, in the case of *George Ferrers*, the Commons endeavoured to assert their own authority in the matter, refused a writ of privilege offered them by the Chancellor, and sent their serjeant to demand the prisoner's release. They won a victory and, with the king's aid, confirmed it. The writ of privilege was still used, but was only allowed to be obtained in consequence of a warrant signed by the Speaker. But the legislative recognition of the privilege which followed the case of *Sir Thomas Shirley* (1603), together with a subsequent declaration of the Commons (1625), 'that the House hath power when they see cause to send the serjeant immediately to deliver a prisoner,' made a writ of privilege needless; and it has become enough either to procure a decree of release from a judge of the court in which the member was sentenced, or merely for the House to issue its warrant or order for the same purpose.

The privilege of *freedom of speech* is a natural and necessary adjunct of any popular assembly; and though it was only claimed by the Speaker from the reign of Henry VIII onwards, it had already been acknowledged by the Crown, and was subsequently confirmed alike by decisions of the law courts and Acts of the legislature. More than one question was involved in the claim. In its barest form, freedom of speech denoted the right of exemption from punishment for words uttered in debate. The need of the privilege was shown from the conduct of Edward I towards Henry Keighley, the spokesman of the Commons in the Parliament of Lincoln (1301); of John of Gaunt towards Peter de la Mare, the 'prolocutor' of the Good Parliament (1376); and of the Yorkist party to the Lancastrian Thomas Thorpe, the Speaker in 1453. The effort of the Commons in the last case, owing to political reasons, met with complete failure; but they had already, in the case of *Haxey*, vindicated their right by obtaining from Henry IV, with the advice and assent of the Lords Spiritual and Temporal, the entire reversal of the judgment passed at the instigation of his predecessor (1397) for the prisoner's reflections in Parliament on the royal household. The principle received further confirmation in the cases of *Thomas Young* (1451) and *Richard Strode* (1512), the latter of which was followed by an Act (4 Hen. VIII, c. 8) condemning as utterly void, both in the case of Strode and of all

members of the present and future Parliaments, legal proceedings 'for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of.' But this statute afforded no protection against the interference of the Crown.

The claim by the Speaker appears first in 1541; but with the growth of the power of the Commons there arose an important question—political rather than constitutional, but (2) involving some important cases—concerning *the class of subjects which it was allowable for Parliament to discuss*. This will be dealt with in the next chapter. Here it is necessary to note that while, on the one side, Elizabeth prohibited the Commons in 1571 from meddling with any matters of state but such as were propounded to them, and followed this up in the Parliament of 1593 by telling the Speaker, when he petitioned for the usual privileges, that liberty of speech meant merely the right of saying yes or no to questions laid before the House; on the other side, Wentworth in the Parliament of 1588 asked, in indignation at these attempts to gag the House, 'whether this Council was not a place for any member of the same, freely and without control, by bill or speech, to utter any of the griefs of the Commonwealth?' The attempt of the Crown to enforce its views led to the cases of *Strickland* (1571), who introduced a bill for reforms in the Book of Common Prayer, and was forbidden to attend Parliament, until the strongly expressed feeling of the Commons caused Elizabeth to withdraw the prohibition; of *Cope* and *Wentworth* (1586), both committed to the Tower, the former for introducing ecclesiastical reforms, the latter for supporting him when the Queen attempted through the Speaker to prevent the reading of the bill; nor were they released until the dissolution of Parliament. Under the Stuarts a similar contention on the part of the Crown gave rise to the cases of *Sir Edwin Sandys* (1621), and of those numerous members who were imprisoned at the end of the session for the part which they took in the drafting of the celebrated protest to the king in defence of the liberties of the House. The last instance of the direct violation of this right was in the cases of *Sir John Eliot*, *Denzil Holles*, and *Benjamin Valentine* (1629), who were imprisoned by the King's Bench for their conduct in Parliament, on the ground urged by the judges, that the

Act of 1512 had been simply a private Act for the relief of Strode. But this judgment was condemned by a resolution of the Long Parliament in July 1641, and was formally reversed on a writ of error by the Lords in 1668; while the Commons in 1667 had not only again condemned it, but had passed a resolution affirming the general application of the Act of 1512. The Bill of Rights finally removed all doubt about the matter by affirming 'that the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.'

It was perhaps natural that privileges of Parliament, like most other rights, should be first vindicated and then extended, until they threatened to lose all basis in reason. The Revolution of 1688 assured to the Commons liberty of speech as against the arbitrary interference of the Crown. But it was the victory of an oligarchy which hastened to share its spoils by the exclusion of all outside influences from admission to the House. These influences could come through two channels—the presence of strangers at the sittings of the House, and the publication for the popular information of the debates in the House. The Commons of the eighteenth century went about to protect themselves from both these dangers. The custom of *excluding strangers from the debates* was probably at first dictated by convenience, for as late as 1771 a stranger was counted in a division. It was no doubt maintained to exclude royal spies, and was thus a valuable adjunct to the larger privilege of freedom of speech. After the Revolution the dominant party in Parliament found it a useful weapon for preventing the words of a member of the opposition from being carried beyond the walls of the House. In the middle of the eighteenth century it was fashionable to attend the debates of the House; but any member could draw attention to the presence of strangers, and the Speaker was then forced to order their expulsion. Matters reached a crisis in the corrupt Parliament which met in 1768. In 1770, on a motion relating to preparations for a war with Spain, the Lords (in this respect were no better than the Commons), despite the protests of Lord Chatham and others, cleared their House of strangers, thus excluding among others several members of the Commons who were waiting at the bar to bring up a bill. These returned to

Extension.
of the
privilege.

(1) Exclusion of
strangers
from
debate.

their own House and, in retaliation, obtained the exclusion of all strangers, including peers. The only peers thus treated were Chatham and his associates, who had withdrawn in disgust from the Lords and sought a refuge below the bar of the House of Commons. Both Houses continued for some years to enforce this exclusion, which ended, in the case of the Commons, in a conflict with the press. Strangers were, however, gradually readmitted, though it was only in 1845 that the standing orders of the House of Commons for the first time recognized their presence. The revival of the practice of exclusion led to a discussion of the process by which it was enforced; and in 1875 it was resolved that the notice of the presence of strangers in the House should under ordinary circumstances be followed by a vote of the House, without debate or amendment, on the question of exclusion. The right of individual members in the matter has been thus curtailed; and the position of reporters, in whose behalf the question was raised, is left to the results of the contest over *the publication of debates*.

(2) Restrictions on publication of debates.

Since such publication on a large scale could only be achieved through the press, the prohibition to print the debates of the House for the general information can only date from a time when the press had begun to be a recognized power. But even then Parliament was willing to waive its rights in the matter if it was a question of gaining popular support. Thus, in 1641 the Long Parliament, while for the first time prohibiting the publication in print without leave of the House, of speeches made within it, itself undertook such publication under the title of 'Diurnal Occurrences in Parliament.' Acceptable speeches of individuals were also printed by its order; but the private publication of his speeches by an opponent like Sir Edward Dering was punished with the utmost severity. Again, in 1680 the Commons directed the printing of its votes and proceedings under the direction of the Speaker to prevent the inaccurate reports which were circulated in pamphlets and in the private letters of members to their constituents. But the prohibition still continued, and with the increased jealousy of outside interference, which succeeded the Revolution, it was maintained by frequent resolutions and the punishment of offenders. But the continued and ill-concealed violation of the privilege led to a resolution of the House in 1738 condemning as 'a high

indignity and a notorious breach of privilege' the publication of any account of its proceedings. This engendered extra caution in the reporters, and the speeches were assigned to fictitious persons in an imaginary assembly. In 1771, however, under the instigation of Wilkes, all precautions were thrown to the winds, and intentionally inaccurate speeches were reported in the daily newspapers under the nicknames of the members. The result was a series of attacks on the printers and publishers, which led to the cases of *Wheble*, *Thompson* and *Miller*. The two former were collusively apprehended in the City of London and discharged by the Aldermen, one of whom was Wilkes. Miller gave the messenger of the House into custody for assault and was upheld by the Lord Mayor, who committed the prisoner for attempting to arrest any one in the City without a warrant backed by a City magistrate. The House committed to the Tower the Lord Mayor and the other Alderman, who were members. Wilkes refused to attend, and was finally left alone. But, despite the order of the House to the contrary, the messenger was indicted, and only escaped through the interference of the Attorney-General; while the House made no further attempt to assert its privilege. Until 1834, however, reporters were surrounded by difficulties. They were not allowed to take notes, and were liable to be crowded out by want of space or to be excluded with other strangers. But after the destruction by fire of the old Houses of Parliament, separate galleries were provided for them. Since then, the House of Commons has facilitated the publication of its proceedings for the information of the electors, and has been followed at an interval by the Lords. Thus, in 1836 the former began the custom of recording and publishing daily the votes of every member—a plan which the Lords adopted in 1857. Again, since 1839 the Commons, and since 1852 the Lords, have published the names of all members sitting upon select committees together with the evidence taken before them; while in 1835 the Commons directed that all their papers should be freely and cheaply sold.

Although the House has asserted its privilege by the occasional commitment of those who have libelled its members in an individual or a corporate capacity, yet the information supplied by the press is so minute, and its comments so unrestrained, that it is not easy to appreciate the *limits* to the

Limits to
privilege of
freedom of
speech.

violation of this privilege. For while, on the one side, the reports of parliamentary proceedings are both made and published on sufferance; on the other side, such publications are equally with any others *amenable to the ordinary law of libel*. This is true of the publication either of a full debate by a newspaper, of an individual speech by the speaker, or of parliamentary papers printed for general distribution by order of the House. With regard to *newspapers*, however, it was decided by the Court of Queen's Bench in the case of *Wason v. Walter* (1868) that an honest and faithful report of a debate in Parliament exempts the proprietor of the paper 'from legal responsibility, though the character of individuals may incidentally be injuriously affected.' But since the parliamentary privilege itself forbids the report of a debate, the publication of his *speech by an individual member* is in no way covered by it; and the printed speech is treated by the law courts as unconnected with any proceedings in Parliament. Thus, while in the case of *Lake v. King* it was held that a member was not liable for otherwise libellous statements in papers circulated among the members themselves; at the same time, the case of *Creevey* (1813) decided that the corrected report of the speech of a particular member was not privileged, which contained 'reflections injurious to the character of an individual.' Finally, the House of Commons found itself, with regard to *papers published by its order*, in the position of the individual member. In the case of *Stockdale v. Hansard* (1836) the Lord Chief Justice and, on appeal, the Court of Queen's Bench, successively decided that an order of the House of Commons was not sufficient justification 'for any bookseller who published a parliamentary report, containing a libel against any man.' The Commons endeavoured to support their printer, Hansard, by an assertion of their privilege; but a lengthy quarrel was only ended by an Act (3 & 4 Vict. c. 9) which provided that all legal proceedings in such cases should be stayed on the production of a certificate that the paper in question was printed by order of either House of Parliament.

(1) Regulating the constitution of the House by

§ 38. The second set of privileges to be noticed—those not claimed by the Speaker—have for their object the assertion of the dignity and independence of the House of Commons. For this purpose it was necessary, in the first place, that the House

should secure the *right to provide for its own constitution*. This right, when translated into act, has included the power of issuing writs for the filling of vacancies among the members; the immediate application of legal disqualifications; and the trial of disputed elections. Writs for the election of members of the Commons were originally issued from the Chancery and, when filled up, were returned for verification to Parliament itself, while complaints against any particular return were heard by the king with the aid of his Council or even of Parliament. After the Act of 1406, which directed that the return to the writ should be made on an indenture signed and sealed by all who took part in the election, these returns were made into Chancery; and although the Act of 1410 gave the inquiry into undue returns to the justices of assize, the king still seems to have reserved to himself, with the help of the Lords or the judges, the consideration of the validity of the return. The growing power of the Commons under the Tudors caused them to claim the exercise of this power for their own House. The first point which they made good was the *declaration of incapacity* to be a member of the House. This was asserted in the case of *Alexander Nowell* (1553) who, being a member of Convocation, was disqualified for a seat among the Commons. It has been exercised, without any reference to a Court of Law, in the case of persons attainted of treason or felony, who by the Common Law are incapable of being elected to Parliament. Such was the action of the House in the cases of *Smith O'Brien* (1849), *O'Donovan Rossa* (1870), *John Mitchel* (1875), and *Michael Davitt* (1882)¹.

7 Hen. IV,

c. 15.

11 Hen. IV,

c. 1.

(a) declaration of incapacity to sit,

¹ p. 164.

Side by side with this right may be placed the *expulsion* for conduct which the Commons have considered to be unworthy of a member of their House. Of this the earliest instances were those of *Thomas Long* (1571), for bribery to secure his return for the borough of Westbury; *Arthur Hall* (1581), for publishing a book 'derogatory to the authority of Parliament'; and *Dr. Parry* (1585), for branding a bill against the Jesuits with the epithet 'bloody.' Among the numerous cases which have occurred in the course of the last three centuries, the most celebrated are those of *Sir John Trevor*, the Speaker (1694), for taking bribes; *Walpole* (1711), for peculation in office; and *John Wilkes* (1764), for being the author of a seditious libel. In the last case Wilkes was re-elected no less than three times, and

(b) expulsion for unworthy conduct.

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the House, having begun by declaring his election void and so creating a new disability of their own devising, ended by pronouncing that the votes given to him were thrown away, and that his opponent, who was in a hopeless minority, was duly elected (1770). Wilkes was elected to the next Parliament (1774), took his seat without further opposition, and ultimately in 1782 obtained from the House a reversal of its former acts against him. The *result* of this and many other cases is that, whilst the House is perfectly at liberty to expel a person whom it accounts unworthy to be a member, such expulsion not only lasts merely for the current Parliament, but it only vacates the seat and does not create a disqualification to sit again, which is beyond the province of the House of Commons. The practical difficulty is that the constituency may continue to re-elect the expelled member to the vacant seat, and so may disfranchise itself for a period of time.

(c) trying
disputed
returns.

The conduct of the Commons in the case of Wilkes was chiefly possible because the House had meanwhile acquired the *right of trying contested elections*. This right was first distinctly asserted in the case of the *county of Norfolk* (1586), in which, owing to some informality in the first election, a second writ was issued by the Chancellor. Whereupon the Commons, despite Elizabeth's assertion that the matter belonged to the Chancellor, held an inquiry and declared the first election good. But it was only after the stubborn resistance of the Commons to James I in the matter of the Buckinghamshire election, known as the case of *Goodwin and Fortescue* (1604), that the Commons definitely secured an acknowledgment of their right to take cognizance of all disputed returns. This right received the sanction of the Court of Exchequer Chamber in the case of *Barnardiston v. Soame* (1674), of the House of Lords in 1689, and of the Courts of Common Law in the cases of *Onslow* (1680) and *Prideaux v. Morris* (1702); while it was taken for granted in a statute (7 Will. III, c. 7) of 1696 which declared the illegality of a double return to a writ. But the temptation to extend the right proved irresistible; and in the case of *Ashby v. White*, followed by that of the *Aylesbury men* (1704), the Commons attempted to adjudicate upon a strictly legal point—the qualification of an elector.

Disputed elections were at first tried by select committees specially nominated, but these were superseded by a permanent Committee of Privileges and Elections, nominated by the House and composed of Privy Councillors and eminent lawyers. This was gradually enlarged by the addition of all Privy Councillors and a large number of lawyers; until it became, after 1672, an open committee of the whole House in which all members were allowed to have a vote. In special cases a disputed election was heard at the bar of the House itself; and in the time of Speaker Onslow (1727-1761) the confidence which he inspired in suitors caused this to become the usual custom. But in the midst of this fluctuating and incompetent tribunal all sense of justice was lost. Each disputed election became a trial of party strength, and members voted for the candidate who professed the same political opinions irrespective of the wishes of the constituents or the merits of the case. The best-known instance is that of the Chippenham election petition, in which the defeat of his candidate was considered by Walpole as equivalent to a vote of want of confidence. In 1770 the *Grenville Act*, named from its author, attempted a remedy for this scandal. The decision of disputed returns was to lie with a committee. Out of forty-nine members chosen by ballot the petitioner and the sitting member were to strike out names alternately until the number was reduced to thirteen. To this number each party should add one nominee, and this committee of fifteen had the power of taking evidence on oath, and decided the matter without any appeal back to the House. This Act, at first temporary, in 1774 became permanent; but it had little effect in curing the old evils. The preliminary ballot became a party matter, and each side struck out its political opponents, while both concurred in omitting all the ablest men. The committee was thus both 'partial and incompetent.' Sir Robert *Peel's Act* in 1839 reduced its number to six, and a subsequent Act to five, nominated in each case by an impartial body—the general committee of elections. But no satisfactory solution was reached until 1868 when, by an entire change of principle, the Act of Henry IV (1410) was revived, and by the *Elections Act* (31 & 32 Vict. c. 125, amended by 42 & 43 Vict. c. 75) the trial of disputed elections was transferred to the judges of the

Methods of
trying con-
tested
elections.

High Court of Justice, to which in the first instance the petition of the aggrieved party is presented. The trial is heard in the neighbourhood whose representation is in question, the decision is reported to the Speaker, and the House takes action thereupon.

(2) Exclusive cognizance of everything within the House.

Limits of the privilege.

The second of the privileges acquired by the House, but nowhere expressed in words, has been described as the *right to the exclusive cognizance of matters arising within the House*. This involves, in the first place, the power of the House to punish its own members, which has been asserted in the cases of *John Storie* (1548), imprisoned for violent language; *Copley* (1558), who was similarly treated for speaking disrespectfully of Queen Mary; Arthur Hall and Dr. Parry, already mentioned; together with all the numerous cases of expulsion for various offences committed inside the House. The extent of this power may be judged from the fact that the law courts have frequently declared that they will take cognizance of nothing short of a criminal offence committed within the House or by its order. Thus, in the cases of Eliot, Holles and Valentine, already mentioned, who were convicted by the Court of King's Bench, among other things, of an assault on the Speaker, the House of Lords, in reversing the decision in 1668, chose the ground that one of the offences, the seditious speeches, was not within the province of the Court of King's Bench. They avoided an expression of opinion on the act which did fall within the competence of a Court of Common Law, and silence would seem to imply acquiescence in such a view. Within recent years the attitude of the law courts in the matter has been most clearly laid down in the case of *Bradlaugh v. Gosset*, in the course of which Mr. Justice Stephen declared that he knew of 'no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.' At the same time, the same judge asserted that the House had the exclusive power of interpreting a particular statute (the *Parliamentary Oaths Act*, 29 & 30 Vict. c. 19) 'so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly.' A distinction was

thus clearly made between acts done in the House itself, and those 'rights to be exercised out of and independently of the House.'

A clear understanding of this principle would have saved more than one conflict between the House of Commons and the law courts. For the Commons, not content with the exclusive cognizance of all that went on within their walls, have been inclined to extend their privileges and to claim for themselves the exclusive power of determining their extent. The reason is obvious. A confirmation in the law courts of a privilege asserted by the Commons may be reversed on an appeal to the House of Lords; while its rejection by the courts leaves the Commons with the sole alternative of a similar appeal. In either case one House becomes the judge of privileges claimed by the other. The Commons have preferred to try and carry matters with a high hand. They have drawn up resolutions of their right to the privileges in question; they have prohibited suitors, and have committed the judges and executive officers to prison for contempt. But the judges have maintained an even course throughout. While admitting the necessity of receiving resolutions of the Commons with all due respect, they regard it as their main business to interpret the law. No resolution of one branch of the legislature can lay claim to the binding force of a statute. Thus no act in itself illegal can be legalized by the authority of the House of Commons, for 'it is necessary, in answer to an action for the commission of such illegal act, to show, not only the authority under which it was done, but the power and right of the House of Commons to give such authority'.¹ These were the principles maintained in the two celebrated cases of *Ashby v. White* and *Stockdale v. Hansard*. In both cases the Commons tried to assert by a resolution what they conceived to be a violated privilege, and to force the law courts to pay heed to it. In the first case, the real question was mixed up with a quarrel over the jurisdiction in error of the House of Lords, and the matter was only ended by the prorogation of Parliament. In the second case, the contest between the Commons and the law courts continued until an Act was passed to protect parliamentary papers from the ordinary law of libel. The contemporary case of *Howard v. Gosset* shows that the law courts were influenced

Conflicts between the Commons and the law courts, over

(i) extent of Commons' privileges,

¹ Justice Patteson, quoted in Erskine May, *Parl. Pract.* (8th ed.), p. 169.

by no capricious motive in their quarrel with the House; for a judgment against the serjeant-at-arms for executing the Speaker's warrant with undue severity was unanimously reversed when the Commons resolved to test its legality by an appeal to the Court of Exchequer Chamber. A similar appeal in the former case would probably have equally resulted in a verdict for the House of Commons. As it was, the Courts maintained their point and clearly established the principle that 'they will not be deterred from upholding private rights by the fact that questions of parliamentary privilege are involved in their maintenance; and that, except as regards the internal regulation of its proceedings by the House, Courts of Law will not hesitate to inquire into alleged privilege, as they would into local custom, and determine its extent and application.' (Sir W. R. Anson¹.)

¹ *Law and Custom of Const.* i. 176.

(3) Punishment for violating privileges.

(ii) limits of power of commitment.

Nor has the question of the extent of its privileges been the only cause of contention between the House of Commons and the law courts. The natural result of the right of the House to exclusive cognizance of matters arising within it, is the *power of inflicting punishment for breach of privilege*. This may be visited either upon a member or upon some one outside the House. Until 1666 it often took the form of a fine, but this has fallen into disuse. The modern forms are expulsion, in the case of a member, and admonition and commitment to the custody of the serjeant-at-arms or to prison, which are applicable to all offenders. It is the limits of this power of commitment which have been called in question by the law courts. The power itself was originally based on the contention, vehemently upheld in the case of Goodwin and Fortescue, that the House of Commons was a Court of Record. But Lord Mansfield denied that the Journals of the House were matter of record; and since the Commons gave up the right to determine disputed elections the claim has lost all meaning. The law courts have themselves maintained this power of the House to punish for breach of privilege in the cases of *Alexander Murray* (1751) and *Burdett v. Abbott* (1810), on the ground of its necessity for maintaining the dignity of the House. But it seems that the Superior Courts of Law, when called on to examine into a return made to a writ of Habeas Corpus which has been sued out by a prisoner committed by

order of the House, have applied to the matter the same principles as guide them in their conduct towards each other. Thus, in both the cases just noted, it was held by the judges that if the commitment was alleged to be for contempt without specifying the precise act, the law courts would not inquire further into the matter, for they had no means of judging of the question. In the earlier case of *Paty* (1705), the majority of the judges practically went further still, and refused even to take cognizance of any act which the House of Commons chose to describe as a contempt; but the two later decisions have made it clear that a specification of the act for which a prisoner had been committed by the Commons, would justify the law courts, in their opinion, in inquiring into its truth and justice. Otherwise the individual would have no protection against an arbitrary vote of the House.

§ 39. The relations of the House of Commons to the Crown had been largely defined by the legal provision for the meeting of Parliament in the Triennial Act, and by the gradual assertion of parliamentary privilege. Equally important is it, in considering the growth of the Commons, to consider their attitude towards the remaining branch of the legislature—the House of Lords. It has already been pointed out that the original difference in the position of the two estates came from the fact that the Lords had a position in the organized body of the Commune Concilium with fairly defined rights and powers. The exact force of this difference may be illustrated from three sides. In the first place, the *wording of the writs of summons* (1) to Parliament would show the part which the Crown intended that each Estate should play in the new assembly. Thus, while the Lords were generally summoned by the formula ‘tractaturi vestrumque consilium impensuri,’ the presence of the representatives of the Commons was desired ‘ad faciendum et consentiendum.’ In other words, the Commons were not called together with the other Estates for deliberation and advice, but merely in order that they might strengthen the resolutions of the king and the Lords with their presence and their supposed assent. Again, the *form of the enactment of laws* (2) originally stated that they were made with the ‘counsel and consent of the Witan,’ and the same form continued to the end of the thirteenth century with the substitution of the word

Relations
of the Com-
mons and
the Lords.

Their
original
attitude.

- 'Barons' for Witan. The early parliamentary form expressed the equal 'consent of the prelates, earls, barons and commonalty of the realm.' But this theoretical equality of the Commons meant nothing, while it displeased the other Estates; and in the first year of Edward III the share of the Commons was more modestly and truthfully expressed as 'petition.' Under Richard II the equality of the Commons in legislation is again expressed; but under Henry IV the formula again mentions the 'request' or 'prayer of the Commons.' Lastly, in the
- (3) *grant of taxation*, each Estate at first voted its proportion separately. But soon after they had separated off definitely into two Houses—of which the first record is found in 1332—the method of grant begins to assume a common form; and the greater importance of the Commons in this particular is acknowledged in the formula that all grants are made 'by the Commons with the advice and assent of the Lords.'

Change
in their
mutual
attitude.

Commons
monopolize
Taxation.

The growing power of the Commons gradually wrought changes in the relations of the two Houses, out of all proportion to the changes in the formulae. Thus, until 1872 the writs of summons to Parliament remained substantially the same as in the fourteenth century. The Lords were still called 'to treat and give their council,' the Commons 'to do and consent to' what is ordained by the Common Council. Now, however, while the summonses to the peers remain the same as always, the Ballot Act has provided for the Commons a shortened form which does not commit itself to the part which the elected members are supposed to play in the assembly. Meanwhile, all the three chief powers which had descended to the Lords from the Commune Concilium were in one way and another challenged by the Commons. An examination of the disputes in each case will show clearly the change in relations which, in the six centuries of their existence, the two Houses have undergone. The Commune Concilium was organized by Magna Carta solely for the purposes of *taxation*. But it was for this very purpose that Edward I included the representatives of the Commons in the National Assembly; and although from an early period grants of money were said to be made by the latter, it was only very gradually that the Lords surrendered all claim to a voice in the regulation of supplies. The first step in the ultimate monopoly

of the Commons in all matters relating to taxation, was taken in 1407. The king consulted with the Lords as to the necessary amount of the supplies to be raised, and then summoned the Commons to communicate to them the decision of the Lords. But when the Commons in alarm complained of this derogation to their liberties, Henry, who had acted in mere carelessness, immediately gave way and, in an Ordinance called the 'Indemnity of the Lords and Commons,' while asserting the right of each House to deliberate by itself on the state of the realm, promised that 'neither House should make any report to the king on a grant made by the Commons and assented to by the Lords, or on any negotiations concerning the grant until both Houses were agreed, and that then the report should be made *in manner and form as hath hitherto been accustomed*, that is, by the Speaker of the Commons'. But although the right of *initiation* was thus gone, the Lords still claimed the power of interfering with money bills by amendment or rejection. The right of *amendment* was denied by the Commons in two resolutions in the reign of Charles II. In the first (1671) they asserted 'that in all aids given to the king by the Commons, the rate or tax ought not to be altered': and they followed this up in 1678 by an elaborate summary of their whole claim 'that all aids and supplies, and aids to his Majesty in Parliament, are the *sole* gift of the Commons; and all bills for the granting of any such aids and supplies ought to *begin* with the Commons: and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants: which ought *not to be changed or altered by the House of Lords*.' But the Lords still retained the right of altogether rejecting a money bill. They were, however, so chary in the use of this power that the Commons took advantage of their forbearance, and by the process of 'tacking' on to a money bill another bill whose rejection by the Lords was more than doubtful, they left the Lords the unwelcome alternative of passing the obnoxious bill or of rejecting the necessary supplies. The Lords in 1702 not unnaturally stigmatized this practise as 'unparliamentary and tending to the destruction of the constitution of this government.' The right

The Lords
deprived of
(a) initiation,

¹ Rot. Parl.
iii. 611.

(b) amendment,

(c) rejection.

of *rejection* was suffered to be in abeyance until 1860, when it was exercised upon a bill for the repeal of the paper duties which formed part of the financial arrangements assented to by the Commons for the ensuing year. This not only upset the calculations of the ministers, but was regarded by the Commons as an invasion of their privileges; and, while unable to alter matters for that session, they drew up for future guidance a series of resolutions which affirmed the sole right of the Commons to grant aids and supplies to the Crown; the jealousy with which the Commons regarded even the sparing use of the power of rejecting money bills exercised by the Lords, since it affects the right of the Commons to grant the supplies, and to provide the ways and means for the service of the year; and finally, the sole power of the Commons to impose and remit taxes and to frame bills of supply that their right as to the matter, manner, measure, or time, may be maintained inviolate. These resolutions are careful not to deny the abstract right of the Lords to reject money bills; but they are intended 'to guard for the future against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over Taxation and Supply'.¹ This, however, is to be done by the Commons framing their money bills in such a way as to render impossible the exercise of the right of rejection. As a practical outcome of these resolutions the Commons in the next year included all the proposed financial measures in one bill; and, as amendment was out of the question, the Lords were constrained to accept the whole proposal, the only alternative to which was a rejection which they were not prepared to adopt.

¹ Anson,
*Law and
Custom
of Const.*
i. 255.

Commons
share in
Legisla-
tion.

The power of the Lords in *legislation* has remained a much greater reality than the power just mentioned. It was under Henry VI that the Commons asserted their equality in this respect with the other Estates of the realm, by substituting the form of bill for that of petition which they had hitherto employed. Thus from 1445 laws begin to be enacted 'by authority of Parliament'; and from the beginning of Henry VII's reign no further mention is made of petition or request; while the general formula which exists to the present day, expresses 'the assent of the Lords Spiritual and Temporal, the Commons in

Parliament assembled, and the authority of the same.' But, except in the matter of money bills, a strict equality has been maintained between the two Houses in legislation. The Lords, equally with the Commons, possess the right of initiative and the power of rejecting or amending a bill which is sent up to them from the Lower House. There are only two methods of overcoming the dead-lock which otherwise ensues on the refusal of one House to accept the amendments of the other. The first is a *conference* between appointed members (called Managers) of both Houses. This was a common custom, especially for the settlement of the money grant, in the last quarter of the fourteenth century. It took the form of a selection of a number of the Lords, either by their own House or even by the Commons, to confer with the whole body of the Lower House. But the Lords were tenacious of their position and seemed inclined to resent the dictation of the Lower House. Thus, although in 1377 the Commons selected the committee of Lords with whom they would confer, in 1378 the Lords described this conference of a select number with the whole House of Commons as a novelty, and preferred the discussion by a committee on either side. Again, in 1381 they resented an application from the Commons to know the opinions of the prelates, barons and judges separately, since it was the practice of Parliament for the Commons to lay their advice before the Lords. Neither was the king particularly favourable to this procedure. In 1383 Richard II attempted to nominate the committee of Lords who should confer with the Commons; and in 1402 Henry IV allowed the conference as a great favour, but his own concession in the matter of taxation five years later (1407) practically conceded the point. Since then, conferences have been frequently held between select committees of both Houses, it being for a long time customary that the number of the Commons nominated should be double that of the Lords. Conferences were either *formal*, in which case they consisted merely in the reading of reasons for its disagreement drawn up by the committee of the objecting House; or *free*, when they took the form of a debate for the purpose of arriving at some compromise or agreement. But free conferences are almost entirely discredited. None were held between 1740 and 1836, and there has been no instance since the latter date: while in

Methods
of over-
coming
opposition
of the
Lords.
(1) Per-
suasion.

1857 even formal conferences were superseded by resolutions of both Houses in favour of messages, unless a conference should be specially demanded by either side.

(2) Coercion.

The second method of overcoming a disagreement between the two Houses is the *coercion* of the House of Lords. This can be in theory effected by a *creation of peers*. It was by this means that the Tory government of Harley and St. John succeeded in forcing the Treaty of Utrecht (1713) through the Whig House of Lords. It was a threat of resort to this means that among other things brought the Lords to reason on the occasion of the first Reform Bill. But although an eminent writer has characterized this power of creating peers as the 'safety valve' of the constitution (Bagehot¹), it seems more consonant with modern feeling and common sense to agree with another (Sir W. Anson) 'that to introduce a number of persons into the House of Lords for the sole object of determining a vote on a particular occasion is a use of legal powers which nothing could justify but imminent risk, in the alternative, of public danger².' A more effectual and constitutional method

¹ *Eng. Const.* p. 229.

² *Law and Custom of Const.* i. 248.

of overcoming the resistance of the House of Lords is by a *dissolution* of Parliament and an appeal to the constituencies to endorse the action of their representatives in the House of Commons. Such was the action taken in the case of the Reform Bill, but then not recognized by the Lords in its full significance. Since then, however, and largely in consequence of that bill, the relative power of the two Houses has enormously changed, and the opposition leaders in the House of Lords, in considering the bill for the disestablishment of the Irish Church (1869), gave way on the express ground that, when the country has once decisively spoken, the Lords no less than the Commons should feel that they hold a mandate to carry out the wishes of the constituents. The only way in which the Lords can assure themselves of the clearness of that speech, is by holding out until an appeal has been made to the electorate. In this way they act as the guardians of the rights of a temporary or accidental minority.

Commons' interference in judicial action of

But the Commons have not only monopolized the right of granting taxes and forced the Lords to acknowledge the necessity of accepting laws at their command: they have even interfered with the exercise of that *judicial* power, a desire to

share in which they themselves were the first to repudiate. The causes of such interference have been twofold. In the first place, the Commons have been led by sheer *jealousy* to resent what appeared to them to be an invasion of their privileges. Thus, in the case of *Shirley v. Fagg* (1675), the question at issue touched the claim of the Lords to hear appeals from the Court of Chancery; and the sole reason for the interposition of the Commons was the fact that the original decision of Chancery had been given in favour of a member of that House. Considering the motive of the Commons it is not a matter for regret that the Lords made good their claim. Again, in the case of *Ashby v. White*, and the succeeding cases, the Commons considered that the Lords in hearing an appeal in error from the decision of the Court of Queen's Bench on the question of Ashby's right to vote, had unwarrantably interfered with a privilege—that of deciding the qualifications of electors—which the Commons quite wrongly claimed for themselves. They even went so far as to commit the other electors, who followed Ashby's example, for breach of privilege, and refused to allow any reference by writ of error to the judgment of the Lords. But the Commons have not always been actuated by such unworthy motives in questioning the jurisdiction of the Lords. They were called upon to take part in the case of *Skinner v. the East India Company* (1668–9), partly perhaps because some members of the Company were also members of the Commons, but chiefly because they were petitioned by the Company and therefore felt themselves obliged to uphold the rights of individuals against an usurped jurisdiction. The quarrel was not fought out to a conclusion; but the Lords gave way and practically admitted not only their own mistake, but the justice of the Commons' conduct in the matter. The Commons were equally successful in their contention arising out of the case of *Fitzharris* (1681), whom they had impeached for a capital offence and whom, as being a commoner, the Lords refused to try. But whether or no such trial would be a violation of the trial by peers established by Magna Carta, there were numerous precedents in its favour, the latest being those of the judges and royal servants who had been impeached by the Long Parliament (1640–1); while all constitutional lawyers were agreed in regarding an

the Lords
called for
by
(1) inter-
ference
with privi-
leges;

(2) excess
of juris-
diction.

impeachment as an exceptional mode of trial. The Commons, in the matter of Fitzharris, protested against the refusal of the Lords as a denial of justice and a violation of the constitution of Parliament, declaring that it was 'their undoubted right to impeach any peer or commoner for treason, or any other crime or misdemeanour.' Fitzharris was tried at Common Law ; but the Lords acknowledged the untenability of their attitude by never again questioning the right of an impeached commoner to a trial at their hands.

CHAPTER VI.

THE ADMINISTRATIVE AND LEGISLATURE IN CONFLICT.

§ 40. THE growth of the power of the legislature has been dealt with at some length. It is necessary, however, to traverse much of the same ground from the side of the executive. It has been seen that until the petitions of the Commons became the means by which legislation was initiated, it is merely complimentary to talk of any assembly as the Legislature. Up to the date indicated, then, constitutional history is chiefly concerned with THE STRUGGLES OF THE EXECUTIVE AGAINST THOSE PROVINCIAL AND DISRUPTIVE FORCES which are so characteristic of early English history. Thus, after the settlement of the English tribes, which took a century and a half to accomplish (450-600), England was divided for more than two hundred years among a number of small kingdoms: and during this period the only semblance of unity came from the organization of the Church and the more or less acknowledged supremacy of one of the larger princes. How soon this would have led on to a more substantial union, it is impossible to determine; for the Danish invasions introduced a new element of disruption. The real unity of England may be said to date from Ælfred's consolidation of Western Mercia with Wessex, which was followed by Eadward the Elder's addition of all England south of the Humber together with his shadowy supremacy over Northumbria. But in the difficulty of swift communication even this was found too great an extent of territory to be governed from one centre; and although in 954 Northumbria also was incorporated within the English kingdom, it was only as an addition to those ealdormanries which Eadward the Elder's son and successor, Æthelstan, had found himself compelled to establish. Thus the last century of Anglo-Saxon

Struggle of the administrative against the disruptive tendencies of

(1) Provincial feeling;

under the Anglo-Saxons.

- (1) history is a time of strong contrast. On the one side stood the king, already as strong, in what may be called his *material strength*, as the elimination of all royal rivals, the maintenance of an extensive thegnhood, and the spread of the practice of commendation could make him. But with the acquisition of a right to the title of King of the English his *personal dignity*
- (2) became much exalted. The limits of its advance may be measured by the promises made by the king to the people at his coronation, that he would do their will although he was their lord, and by the continued exercise of the Witan's power of deposition. For the present, the king shared with other lords the advantages to be derived from the imposition of oaths of fealty and the maintenance of a law of treason. But it was probably this enhancement of the personal dignity of the Crown which, coupled with the commendation of the princes of the Welsh, Danes and Scots to Eadward the Elder and the bestowal of Cumbria and Galloway by Eadmund on Malcolm, the son of the Scotch king, and (more doubtfully) that of the Lothians by Eadgar on Kenneth II, caused Æthelstan and his successors to assume the imperial titles of Imperator and
- (3) Basileus. Alongside of this personal assumption ran an increase of *official position*, which gradually transformed the king from representative of his people and the guardian of law to lord of their land and the source of all justice. On the other side stood the great ealdormen, who whether the descendants of the old royal houses, or related to the West-Saxon royal family, or the nominees of the reigning king, equally represented the *strong provincial feelings* which had been fostered by the separate and mostly antagonistic existence of 400 years. Except under a very strong king they could manipulate the Witan; while locally their action could and often did paralyze that of the Crown. Indeed, the division into ealdormanries was a change of name more perhaps than of fact. Whatever was the outward form, the disruptive spirit characteristic of feudalism was abroad in England in a far stronger measure than it ever was after the Conqueror had done his work; and in a much more real sense than ever after the Norman Conquest, the king realized the feudal position of 'primus inter pares.'

The Anglo-Saxon kingdom had succumbed altogether to that provincial feeling which had made her rulers powerless

against Danes and Normans alike. William and his successors determined at all costs to remedy this 'centralization without concentration' which had placed them where they were. Fortunately, two reasons made this possible as it had not been possible before. *Firstly*, the Normans, as a small band of strangers among a hostile population, were obliged for the sake of military discipline to submit to restraints which they would otherwise have refused. Thus, while the tenure of land was on the feudal condition of specified military service, William took care to avoid the accumulation in the hands of any one individual, of large contiguous estates which should make the owner a more powerful person than the local representative of the king. *Secondly*, the presence of a common foe caused the English people at length to draw together. The king perceiving, with the instinct of a statesman, that they were unable to organize themselves, did everything to win their confidence. Thus he went out of his way to maintain as much of the old constitution as he could understand or profitably use. He solemnly confirmed Eadward the Confessor's laws, and by evidence of representative local men, whom he again used for the compilation of Domesday Book, he collected the customs of the English. He paid a similar reverence to English institutions. The principle of selection embodied in the *Witan* enabled him to dispense with the feudal council of tenants-in-chief. The *local courts* of shire and hundred were a counterfoil to the feudal and manorial jurisdictions. The *fyrð* was, in theory at least, the nation in arms. The old *oath of fealty*, which was enforced on all landowners without distinction of tenure at the famous meeting of Salisbury in 1086, was a denial of the exclusive claims to their tenants' services made by the feudal lords.

under the
Normans.

Meanwhile a new power had arisen which was as necessary to the aims of the Crown and the growth of nationality, as that of the baronage itself. The Anglo-Saxon Church had on the whole acknowledged only a somewhat shadowy supremacy on the part of Rome and, as a consequence, England, despite the efforts of Dunstan's party of reform and the foreign bishops introduced by Eadward the Confessor, remained ecclesiastically provincial. The clergy sat in the secular courts and connected themselves by marriage with the local gentry. William's work

(2) claims
of the
Church;

William I's
ecclesiasti-
cal policy.

was to bring the English Church into harmony with ecclesiastical discipline and thought in the rest of Western Europe. The prevailing sentiment of the Church demanded such a separation between things ecclesiastical and things temporal as was implied in the celibacy of the clergy, which, to avoid a great outburst of feeling, Lanfranc only gradually introduced; and in the establishment of distinct ecclesiastical courts, which fell in with William's idea of using the Church as a counterpoise to the feudal barons. He accordingly made the bishops hold their lands on baronial tenure, and by an Ordinance removed them from the shire court to tribunals of their own. At first sight it seems as if the Conqueror, in striving to correct the centrifugal tendencies of Anglo-Saxon institutions and of the feudal system as it was ordinarily worked, had merely substituted one kind of disruption for another. But it must be remembered that the Church was 'the sole depository of mental and moral authority,' and that it was only by such isolation from the world of the feudal baron that its full effect as a civilizing agency could be felt. Anselm and Becket, either or both, may have been fighting for their order rather than in the general interest of the nation; but behind the actual subjects of their contest lay that principle of appeal to some other standard than brute force, which the whole existence of the clerical order represented. Yet none the less was the Church inimical to the growth of nationality. William tried to provide bulwarks against the interference of Rome. He not only exercised the power implied in the direct appointment of bishops and their investiture with the ring and crozier, but he also refused homage to the Pope, and issued, in the form of a declaration of old customs (*Consuetudines*), four prohibitions of the exercise of important ecclesiastical powers without leave of the Crown. But this policy depended for its success on the harmonious working of the local heads of Church and State: for when the throne fell to a less statesmanlike monarch, the Archbishop would be bound to fortify himself and his order by an appeal to that clerical immunity from lay jurisdiction of which William I had himself laid the foundation; and, in the last resort, to that very papal influence which it was alike the interest of king and bishops to exclude. Moreover, this close alliance between the heads of Church and State, while

Its results.

for a time moralizing the action of the State, tended inevitably to feudalize all ecclesiastical relations. Bishops became the reward for temporal service: the feudal passion for exemptions and special jurisdictions helped the growth of clerical immunities. Stress was laid on rights rather than duties, and it was this weakening of the inherent feelings of responsibility which enabled William II and his minister, Ranulf Flambard, to deal with the property of the Church on the same principles as they applied to the fiefs of lay barons. The futility of Anselm's continued protests led him finally to betray the nationality of the Church, which as a foreigner he had never valued, and to seek counsel from the Pope.

Thus the two enemies which threatened to circumscribe the growth of the executive, were the provincialism of the feudal baronage and the cosmopolitanism of the Church: the one, with the aid of the rest of the nation, the King crushed: with the other, despite the willingness of the nation to help, he found it more advantageous to come to terms. For a century (1074-1174) the baronage struggled in arms against the Crown, generally finding a leader among the members of the royal family. Their chief strength lay in those continental connexions which enabled them to fortify their own appeal to arms by a rising in the foreign dominions of the English King. Henry I attempted to sever the Norman and English barons by confiscating, on every rebellion, the estates of the Normans on this side of the Channel. But the twenty years of anarchy identified with the name of Stephen, destroyed the good effect of this and other measures directed to the same end. *Henry II* went steadily to work on the lines laid down by his grandfather. On the one side, he *undermined the feudal position and privileges of the barons*. Henry I's charter on his accession not only renounced the feudal tyrannies in which William II had indulged, but even enforced on the great lords a similar restraint in their conduct towards their vassals. He probably also began that system of scutage, or acceptance of payment in lieu of personal service, which destroyed the principle of the feudal army. Henry II not only continued this, even to the extent of transferring the feudal tenants so disarmed to the ranks of the fyrd; but he even included the feudal jurisdictions in the judicial system of the country, by enforcing in the Assize of Clarendon

(3) Feudalism.

Henry I's and Henry II's anti-feudal policy.

(1166) the supervision of his sheriffs and justices. On the other side, Henry I and his grandson both strove to counteract the influence of the baronage by the *formation of a strong central government*. This was begun by Henry I's great minister, Bishop Roger of Salisbury, in his organization for financial purposes of the machinery of the Exchequer. He created his own staff out of the *novi homines* or new official nobility who were planted upon the lands of the North left desolate by Henry's father. Out of these were taken the sheriffs, who summed up the local administration; and the barons of the Exchequer, who went round, although in irregular fashion, to watch over the conduct of the sheriffs and to listen to any local complaints that might be preferred against them. Henry II carried this organization further. He placed the Curia Regis, or High Court of Administration and Justice, alongside of the Exchequer, and separated it off from the somewhat vague Commune Concilium in which it had hitherto been completely merged. He went a step further in making a distinction between the judicial and administrative functions of the Curia Regis; which ultimately resulted in the formation, on the one side, of the three Courts of Common Law and, on the other side, of the Concilium Ordinarium. He continued the creation of an administrative nobility to whom, after 1170, he entrusted all the sheriffdoms. By thus making the sheriff a mere official of the Crown he kept a constant connexion between the central and local government; and, not content with that, he subjected him to the supervision of frequent emissaries of the Curia Regis, travelling now in the capacity of barons of the Exchequer, now as justices on circuit. Furthermore, the Forest Courts, which everywhere lay side by side with the local courts, with an absolute power over all dwellers within the ever-increasing forest boundaries, enabled the king to stretch his arms into the remotest corners of the land, and to oppose to the Common Law a system of crimes and penalties drawn from no source beyond that of his capricious will dignified with the name of the royal prerogative. It was these attempts of Henry II to curb their liberties that drove the feudal barons to their last insurrection in 1174. Its suppression, owing to the fidelity of the king's officers and the sympathy of the people with the royal cause, inflicted

on feudalism in England a wound from which it never recovered.

Henry's complete success cowed the barons too much for them to attempt anything while he lived; and his successor occupied them in the Crusade and his French wars. But it was the loss of Normandy which really placed the feudal baronage beyond any hope of recovering their position; for it forced them to decide whether they would be Normans or Englishmen, and taught them for the first time that they had interests in common with the people. Their momentary championship of the popular cause at Runnymede led to their control over the administration during the minority of Henry III. But this only sufficed to show their selfishness and incapacity. Their patriotism was founded on nothing deeper than hatred of the foreign favourites of the Crown. They sought to secure the appointment of the sheriffs and the ministers, while they obtained for themselves exemption from attendance at the popular courts and attempted to conduct the administration by committees of jealous barons who neither did anything themselves nor allowed it to be done. Henry III's only attempt at influencing the baronage was to concentrate all the great titles by marriage in the members of the royal family. The later Anglo-Saxon kings had treated the ealdormen in a similar manner. But this was never a solution of the difficulty. Certainly a small party, headed by Simon de Montfort, rose superior to the interests of its class. But as in the contest which procured the Charter, this was a momentary aberration from their general line of conduct.

Edward I had to go to work in a method very similar to that of his great ancestors, the two first Henries. The institution of scutage and the loss of Normandy had done their work, and the feudal army no longer offered any cause for fear. But the feudal jurisdictions had grown from usurpation of royal rights, and Edward's issue of writs Quo Warranto was directed to the establishment of the difference between manorial rights which could be left to the lords, and feudal rights as such which, in England, were usurpations of the regalia. The *barons* were still, however, too strong to be overborne. He preferred, therefore, to *attack them indirectly*. Setting before himself as a principle 'the elimination of the doctrine

Their
partial
success.

Edward I's
anti-feudal
measures.

of tenure from political life,' he began by diminishing the importance of a feudal status. For this purpose he perfected the measure of Distrain of Knighthood, begun by his father, which made knighthood a mere question of income; and he introduced a new qualification for membership of the Commune Concilium in the royal summons alone irrespective of tenure. But he could go no further in his direct attacks upon the barons; for the people were insufficiently organized, and the Church with its foreign ties could not be depended on. He had, therefore, even to bribe the great barons into acquiescence with his general schemes by allowing them to share in the advantages of that land legislation which, by the statute *De Donis*, established entail; by *De Religiosis*, prevented the alienation of lands to the Church; and by *Quia Emptores*, put an end to the losses which accrued to the superior lords through subinfeudation. But the real force which was counteracting the power of the barons, was *the continued development of a strong central government*. Henry I's measures had been retarded by the anarchy of Stephen's reign, Henry II's by that of John. The long strife of his father's time emboldened Edward I to strengthen the Crown by every means at his disposal. For purposes of administration he formulated the Concilium Ordinarium which had sprung up as a Council of Regency in his father's reign, and made it more than formerly dependent on the Crown. He further simplified and defined both the provincial jurisdiction of the judges in the Statutes of Westminster I (1275), Gloucester (1278), and Westminster II (1285); and the work of the Courts of Common Law by the Statute of Rhuddlan (1284), and the *Articuli super Cartas* (1300).

Formation
of a national legis-
lature.

But Edward's great work was the incorporation of the people in the government by the completion of the form of the National Parliament. This popular participation had been the strong portion of the Anglo-Saxon system which William I had continued. He retained the local organization for the administration of justice, in the courts of shire and hundred; and for internal defence, in the liability of all freemen to the fyrd. Both were placed under the sheriff, whom the abolition of the local earldom, and the relegation to his own court of the local bishop left as the sole representative of the

central government in each local district. Every precaution was taken, while strengthening his local power, to keep this official in proper subjection to the royal administration. Henry I and his grandson both appointed royal officials to the post, and subjected them to the supervision of other officials. Part of their duties were made over to other specially appointed persons. Their tenure of office was limited. But chiefest of all, the people were enlisted on the side of orderly government; and the sheriff found himself under the necessity of relying in nearly every department of business on the co-operation of a representative body of the neighbourhood. William I had already used the system of witness by local committees in compiling the Ancient Laws and the Domesday Book. Under Henry II, the same system was gradually applied to the needs of civil and criminal justice, and even to the assessment of taxation. The establishment of trial by jury did away with the earlier and more conjectural methods of compurgation and ordeal. The extension of the principle of local representation to the region of taxation, led directly to the formation of a National Parliament. The principle was first applied indirectly. By the Assize of Arms in 1181 the old fyrd was reorganized on the basis of the differences in individual wealth, and each man's liabilities were determined by a jury, i.e. a sworn committee, of his neighbours. The liability lasted on; and the force itself, placed under its own constables and supervised by special justices, settled into the position of a local police. Meanwhile, the levy of taxation on personal property which, with the increase of commerce and wealth, was becoming as usual as it was profitable, called for the continual activity of juries elected in the local courts, in which the greater barons were no longer present. But the larger part of this personal property was to be found in the boroughs on which the kings from Henry I onwards had, sometimes from an enlightened policy, but oftener in return for a substantial sum of money, bestowed the powers of self-government. Both classes—representatives of shires and of boroughs alike—owed their summons before the king to a series of accidents; but if the Charter was to be a real guarantee against royal tyranny, something more was needed than a baronial council disposed to hold the crown in commission. Thus Edward's early

recognition of this, which ended in the creation of what has since been called the 'Model Parliament' in 1295, was followed almost immediately by the great Confirmation of the Charters (1297), to which subsequent generations so frequently appealed.

Relations
between
the ad-
ministra-
tive and
legislature.

§ 41. From the definite establishment in Parliament of a legislative body apart from the executive, the struggle of the latter to withstand the disruptive tendencies of feudalism gives way to the question of THE RELATIONS BETWEEN THE EXECUTIVE AND LEGISLATURE, which now becomes the central feature of English constitutional history. The indistinctness of the line drawn before Edward I's defining policy between the Commune Concilium and the Concilium Ordinarium, had previously obscured the natural division of the two functions. But from Edward I onwards, the Council and Parliament stood apart in clear contrast to each other. The king preferred to act through his Council, but was obliged occasionally to consult Parliament. Edward II, as against the barons, assented in 1322 to the declaration that all the affairs of the country should be 'treated, accorded and established in parliaments by our lord the king, and by the consent of the prelates, earls and barons, and commonalty of the realm.' Edward III's continual necessities were the occasion of the acknowledgment of all kinds of powers as residing in the Commons; but, at the same time, their reiterated petitions against the action of the Council show that the executive had the upper hand, and that the grant of extensive powers carried with it no real authority, beyond an occasional opportunity of hampering the government. Nor, with all its outward appearance to the contrary, did the extraordinary prosperity of Parliament under the Lancastrians, tell a really different tale. The powers won early in the fifteenth century were little more than a repetition of those which had been partially acknowledged by Edward III. The confirmation which they obtained under the Lancastrians, was the result of a reaction following on Richard II's attempted despotism. To the factious Lords Appellant who, by a repetition of the Provisions of Oxford and the Ordinances of 1311, had early in his reign placed the royal authority in commission, Richard opposed all the discontented classes in the kingdom, whether Lollards or unenfranchised peasants who had equally participated

Early pre-
dominance
of the
administra-
tive.

in the Peasant Revolt of 1381. The division of his enemies enabled Richard to use Parliament for effecting his purposes, and a carefully packed House of Commons made the king independent of further supplies by giving him an income for life; and delegated its authority in the matter of petitions to a small committee of both Houses which the king could easily influence.

Thus the Revolution of 1399 by which Richard was dethroned, like that of 1688 to which it has often been compared, was in one aspect a conservative and orthodox reaction. *Henry IV* came to the throne as the champion of the Church against the Lollard tendencies of Richard's court, and as the upholder of constitutional government against Richard's despotism. But in another aspect, the accession of the Lancastrian dynasty meant *the triumph of the legislature over the executive*. For Henry's title was merely parliamentary. He was thus doubly pledged to the maintenance of constitutional rule; and it is not difficult to understand the meaning of the extraordinarily full privileges and powers which were obtained by Parliament from the Lancastrian kings. Thus (1) control over taxation was secured through the establishment of the power of the Commons to initiate money grants (1407), of the principle that redress should precede supply (1401), of the appropriation of supply and of the audit of accounts. To this was added (2) control over legislation, partly through the influence which Parliament possessed over the nomination of the Council, but chiefly through the substitution for the old petition of the form of bill or actual wording of the subsequent statute. The germ of parliamentary privileges is found in the assertion of (3) freedom of speech. But all these were of little account compared to the maintenance of (4) ministerial responsibility. In moments of extreme aggravation the legislature had sometimes demanded the right of electing the ministers. This had been enforced by the capital punishment of the obnoxious minister and, under Edward III, by the practice of impeachment. These were, however, heroic remedies. The circumstances under which the Lancastrians came to the throne established a sounder method. The election of ministers was impracticable; but from 1400 to 1437, when Henry VI assumed the reins of government, the Council was little else than a com-

Triumph
of the
legislature,
1399-1437.

mittee of parliamentary nominees; for the king nominated its members in Parliament, which felt itself justified more than once in passing what amounted to votes of confidence in the ministers. The influence of the Commons extended even to (5) direct control over foreign affairs, a power which they had definitely rejected when offered for sinister reasons by Edward III and Richard II, but which under the changed conditions they did not hesitate to wield.

Its failure.

But this triumph of the legislature over the executive was *far too premature*. It was useful as affording precedents to a future time; but, at the moment, the extensive rights enjoyed by the Commons were a hindrance to constitutional growth, for they only served to hide the insurmountable obstacles in the way of efficient government. In the fourteenth century, the chief obstacle to the progress of the Commons had come from the jealous attitude of the king who, as the bonds of parliamentary control were drawn tighter round him, used every indirect means of loosening the threatened pressure. In the fifteenth century, owing to the peculiar position of the Lancastrian dynasty, this influence was usurped by the nobility. The Commons could protect themselves by legislation against the unlawful action of the sheriff, and could maintain a theoretical control over the nobility in the supervision of the Council; but, unassisted by the weak executive, they were powerless against that enormous local influence which, upheld by the practices of livery and maintenance, defied royal judges and sheriffs, and revived the old feudal evil of private war to an extent unknown in England since the anarchy of Stephen's time.

Causes of the failure.

The cause is to be sought in the history of the previous century. The policy of the Crown in abolishing all privileges connected with the feudal status, had been largely counteracted by Henry III's success in accumulating the great titles within the royal family, and by Edward I's necessity of making the greater barons sharers with himself in the advantages of his land legislation. For, as a consequence of these two measures, the nobility concentrated upon itself, and became an intermarrying and exclusive caste. Since land could now be both freely alienated and also tied up in entails, estates were accumulated in the hands of a few great owners to an extent which William I's original method of

distribution had rendered impracticable. Thus all disputes between individual nobles were enhanced by the fact that they gathered up at once the special bitterness of family feuds and the petty and hereditary jealousies which spring from neighbours' rivalries. But further than this, the growing practice of entails prevented the younger son from obtaining any settlement upon his father's lands. He was compensated by the creation of small sinecure offices of state and by the monopolization, to the injury of the Church, of all lucrative ecclesiastical posts. In other words, the great nobles, not content with disposing of their own extensive patronage, usurped much from the Crown, sometimes in return for bribes (a system of traffic termed 'brokage'), sometimes merely to extend their local influence.

From three sides might this influence have been checked ; (1) but the *Crown*, besides its weak hereditary claim, was, despite the addition of the Lancastrian inheritance, impoverished by the large grants which it had to make as hush-money to the nobles. It was, consequently, unable to deal severely with great offenders who had it in their power at any moment to open the question of its right to the throne ; while its attempts to found its claim upon a brilliant foreign policy ended, after a momentary success, in an ignominious failure which brought about the very rivalry which it was intended to avert. Nor was the *law* any more capable of (2) restraining the nobility. The early part of the fifteenth century was a time of great legal advance under the expanding influence of the Chancery and the scarcely less important decisions of many great judges in the Courts of Common Law. Yet the administration of the law was full of the most flagrant abuses ; for writs of all kinds could be readily purchased, even royal writs interfering with the course of justice ; and the nobles did not scruple either to ignore adverse decisions of a superior court or to intimidate the local courts into subservience. *Parliament* was no less powerless to aid ; for not only were the (3) Commons wanting in permanence and themselves an oligarchy, split up by religious differences and subject to the influence of the nobles ; but their supervision of the executive was little short of dictation—a function which their utter want of a wide experience disqualified them from assuming. The whole position has been summed up in the phrase that *Constitutional*

progress had outrun administrative order. It does not help us much to say that the Lancastrian rule was constitutional, thereby meaning that in its strongest moments it attended to legal forms and acted in harmony with Parliament; for the real power lay not with King or Parliament, but with a selfish oligarchy of nobles, whose local and family quarrels made government impossible alike at home and abroad.

Triumph
of the ad-
ministra-
tive, 1437-
1588.

§ 42. It is not unfair, however, to call the Lancastrian era 'a great constitutional experiment.' The triumph of the legislature which was its key-note, was of short duration. Already in 1437 the executive, in the shape of the Council, had freed itself from the trammels imposed on it during nearly forty years; and on the accession of the Yorkist dynasty, strong in the possession of hereditary claim and successful on the battle field, it obtained an authority which it had not wielded since the creation of Parliament. Nor was this only because Parliament as an institution had met with complete discredit. It had certainly failed as an active engine of government, and it was becoming increasingly less representative of the interests of the nation. It was, therefore, without exciting any popular commotion, that Edward IV began the policy of *dispensing with Parliament*, which his successors for a while continued. The later fifteenth century was everywhere a time of great social reconstruction. The two great mediaeval bonds of Feudalism and Catholicism were both relaxed. The intense local spirit of the first and the universal claim of the last were both giving way to the rising claims of nationality both in state and church; and in the midst of this transition every one looked to the monarchy as the one stable power. In England, as elsewhere, a succession of able sovereigns answered the call upon them, and made use of their opportunities to build up a strong executive. The first need of the government (1) was a *great treasure*, doubly necessary if no recourse was to be had to Parliament. The poverty of the Lancastrians, which had in no small degree been responsible for their failure, was retrieved by Edward IV by participation in the rising commercial spirit of the time; by Henry VII through the revival of obsolete royal and feudal rights; by Henry VIII through the confiscations of monastic property; by all three kings through loans and benevolences in the place of regular taxes.

1461-1529.

A scarcely less important need of the Crown was to surround itself with a *subservient nobility*. The power of the old nobles (2) who remained, was destroyed successively by the two Yorkist brothers and by the two first Tudor sovereigns through means of adverse legislation, such as the Statutes of Fines and of Liveries, by confiscations, and executions on the slightest pretext. The Reformation did away with the abbots, the least national element in the House of Lords, and bound the bishops to the side of the Crown. Already Edward IV had roused the discontent of the old nobility by raising his wife's relations to a level with them in the House of Lords. Henry VIII placed alongside of the subservient bishops a number of lay nobles whose chief claim to distinction was their official connexion with the Crown. But the kings did not stop here. Yorkists and Tudors alike sought to make their system of government acceptable by the adoption of a *popular policy*. Edward IV threw himself (3) into the literary and commercial movements of the day, and was especially popular among the burgesses. Richard III tried to secure his precarious crown by promoting a mass of acceptable legislation in the only Parliament which he called. Henry VII gave the country the peace and security which above all things she desired. Henry VIII gratified the pride of his people by raising England once more to a position of importance in Europe. But this abeyance of government through Parliament was a policy of expediency, whose continuance was rendered practically impossible by the expenses incurred through Henry VIII's personal extravagance and his extensive foreign policy; while the rise in prices consequent on the influx of precious metals from America, increased expenditure without necessarily raising the amount of the revenue. The means at the disposal of the Crown, which were consistent with the maintenance of popularity, were entirely insufficient apart from parliamentary grants. The king, therefore, probably at the persuasion of Thomas Cromwell, preferred to summon Parliament with regularity and trusted to the influence at his command to *manage* it in a way (4) 1529-1603. favourable to his designs. The Crown was aided by the harmony which existed between it and the people over the religious questions of the day; and the extent of its success may be measured by the numerous and swiftly alternating

changes in which Parliament acquiesced, under Henry VIII, Edward VI, and Mary alike.

The administrative under the Tudors.

But whether the Crown practically dispensed with Parliament or manipulated it, the executive dealt in the same way with any of those constitutional checks upon its power, in which the circumstances of the Lancastrian kings had caused them to

- (1) acquiesce. Thus the exclusive parliamentary right of taxation was set at nought by the levy of forced loans and benevolences; the grant of monopolies in all kinds of articles; the increase of customs under the last two Tudor sovereigns; and the infliction of heavy fines by the Star Chamber. No less was the
- (2) exclusive parliamentary right of legislation overridden by the extensive use of royal proclamations; while the freedom of
- (3) the individual as secured by none but a legal arrest and a speedy legal trial, became a mere farce before the widely extended sphere of action assumed by the Council; the inclusion of all kinds of offences under the head of treason; the unwarrantable use of martial law; and the intimidation of juries by heavy fines in the Star Chamber for verdicts adverse to the interests of the Crown.

The legislature under the Tudors.

But despite the careful and unscrupulous management of the Crown, Parliament did not sit down patiently while all the rights which gave any meaning to its existence were thus whittled away. When first left face to face with the Crown its opposition was, as might be expected, small and very occasional: but this is all the more striking from the contrast with the usual subservience of its attitude. Thus, under *Henry VIII*, on Wolsey's demand in 1523 for a large subsidy of £800,000 by an income tax of one-fifth payable over five years, the opposition in Parliament caused an unprecedented debate of a fortnight's duration, and the royal supporters had in the end to be contented with a somewhat smaller subsidy. Again, on two occasions Parliament excused the king from the repayment of the loans which he had contracted—a license which referred, in 1529, to all the previous unpaid loans of the reign; and in 1544, to those of the two

21 Hen.

VIII, c. 24.

35 Hen.

VIII, c. 12.

preceding years together with the resurrender by the lenders of all those which the king had repaid. These can scarcely be construed as other than instances of parliamentary subservience. But it is necessary carefully to discriminate from these two other statutes which outwardly bear marks of the

same spirit. The Statute of 1539, which endowed the king's proclamations with the force of law, and that of 1544 which allowed the king to nominate his successor, were both statutes of limitation; for the first statute, dealing with a power which would in any case be used illegally, excepted any proclamation that was prejudicial to a subject's property or person, and the second limited the royal power of nomination to the successor of Henry VIII's three children, whose rights were thereby assured. The Council of *Edward VI* found it necessary to make concessions, and the Statute of Proclamations was repealed. After events nullified the use to which Henry put the power given him in the second statute, by preferring the family of his younger sister over the Scotch royal house. The weakness of the king and the divided state of his Council encouraged Parliament; and in 1552 a House of Commons whose elections had been controlled by the Council rejected a bill including new crimes under the head of treason, and substituted a more moderate statute containing a safeguard in the requirement of two witnesses to a charge of treason. Even *Mary's* enthusiasm met with a substantial check from the opposition which she encountered from Parliament. The first cause of quarrel—her Spanish marriage—could only be carried out after Parliament had been dissolved and Wyatt's rebellion suppressed. The Commons offered no opposition to the reconciliation with Rome; and not only did *Mary's* second Parliament restore the Church to its position previous to the Reformation, but even Cardinal Pole was suffered to land in England. This, however, was only after considerable contention and on the clear understanding, unpalatable as it was to the Queen, that the holders of the monastic lands should be confirmed in their possession of both the land and the impropriated tithes. *Elizabeth* had to meet a House of Commons emboldened by previous victories, independent from the wealth of monastic lands and still more of commerce, and permeated with the Puritan spirit which martyrdom and contact with foreign reformers had rendered aggressive; but during the early years of the reign the serious danger in which the country lay caused them to stay their hand and to mingle courtesy with their boldest remonstrances. Elizabeth on her side redoubled the efforts

³¹ Hen.
VIII, c. 8.

³⁵ Hen.
VIII, c. 1.

of her predecessors to maintain a hold over Parliament. But these only served to postpone the inevitable trial of strength between an overweening executive and a well-equipped legislature; and with the disappearance of foreign danger on the defeat of the Spanish Armada, the armed truce which had hitherto existed between the Commons and the Crown, practically comes to an end.

Transition
from
Tudors to
Stuarts.

Under the Tudors *foreign politics* had assumed an inordinate importance, since the establishment of the Reformation in England threatened to unite the Catholic powers of France and Spain against her. These now sank into the background. At the same time, the conversion of tillage into pasture and the consequent displacement of the villan population; the cessation of the French wars and the break up of noble retinues, which let loose a number of vagabonds trained to no occupation but that of arms; the enclosure of common lands and the transference of monastic property; the influx of precious metals from America, and the debasement of the coinage by Henry VIII and the ministers of his son—all these had raised *social questions* of the utmost magnitude which had now gradually been set at rest. The buccaneering expeditions on the Spanish Main, and the formation of numerous trading companies, had drawn off the more restless spirits; the introduction of new manufactures by the Flemish and Huguenot refugees had given work to the industrious; the consolidation of a Poor Law dealt alike with the vagabond and the impotent poor; while the revival of an efficient system of local government under the centralized administration of the Justices of the Peace, secured that order in everyday transactions which is so essential for the encouragement of trade and manufacture. Other questions were now to occupy the national attention. The speculations of the Renaissance on the origin of Society, and the doubt thrown by the Reformation on the place of authority in religion, both contributed to place *constitutional and religious questions* in the forefront. Is authority, whether in State or Church, republican or monarchical? Is it, in secular affairs, based upon a contract, whose violation justifies its withdrawal; or upon indefeasible and inalienable right? Does the divinely appointed form of Church government reside in bishops or in a board of presbyters? The answer of the Tudors to these questions had been most

decisive. The royal prerogative and the royal supremacy went hand in hand. The Commonwealth of England was administered by the king and his officers, whether members of the Council or bishops. Parliament was only summoned to discuss such matters as the Crown chose to lay before it: when it stepped outside this limit, the Crown exercised a right of interference. What else was the meaning of the Speaker's request from the Crown at the opening of each Parliament for freedom of speech; and was not the king able to dissolve Parliament when he would? In her theory of ecclesiastical government Elizabeth went strangely near the maintenance of the Church as a department of State; and her threats to contumacious bishops seemed to betray her concurrence in the belief of the councillors of Edward VI, that the rulers of the Church held their power and dignity entirely at the pleasure of the Crown.

§ 43. The Tudors, then, bequeathed to their successors a strong executive; and the uses to which the Stuarts put it were merely imitations of Tudor precedents. There was the same overriding of parliamentary legislation by proclamations and dispensations. For parliamentary grants were substituted loans and benevolences, monopolies, increased customs, obsolete royal and feudal rights. The only great novelty was perhaps the addition of a subservient bench of Judges to the means employed by the Tudors for invalidating individual liberty. If, then, the Stuarts were in their acts mere imitators of their predecessors, it is important to understand why their government was as great a failure as that of the Tudors before them had been successful. Something must no doubt be attributed to the different political and social conditions of the two epochs. Those changing conditions and disturbing circumstances, which had made the people acquiesce in an arbitrary royal power as the one guarantee of order, had passed away. The Tudors had held it as long as they reigned, only because they were ever regardful of popular opinion. They had been content to enjoy the reality of power, and had not cared to reduce its claims to definition. But the Stuarts were not Englishmen, and did not understand English modes of thought. Their whole foreign policy is a sufficient proof. The Spanish Marriage was peculiarly abhorrent to the English

Struggle between the administrative and legislature, 1603-1642.

Causes of the struggle.

nation; yet it was the centre of James I's foreign policy. No less unsympathetic was their religious policy, and James' principle of 'no bishop, no king,' so identified the Church with monarchy, that the former wellnigh perished in the Great Rebellion. The truth was that the Stuarts had no traditions of rule to maintain; and in default of them, they fell back upon definitions of those rights of royalty, which they found that their predecessors had enjoyed. Unfortunately, in their case, the current theory of kingship by divine right received a great confirmation from the circumstances of James' accession; for his acceptance in England contradicted both the Statute Law by which Henry VIII had given preference to the descendants of his younger sister Mary, now represented by the disgraced family of Grey; and the Common Law of the land which forbade an alien, as James was, to inherit land in England. Everything, then, converged to make James and his son take up an anti-national position. The remonstrances of Parliament were met by definitions of the royal prerogative, which in their turn challenged Parliament to fall back upon the privileges won by the Commons in the days of the Lancastrians. As the need for tact increased, so the amount of tact which royalty displayed, diminished; and at a time when the rising power and independence of the Commons made them increasingly sensitive to anything save the most punctilious treatment, the Crown paraded its prerogative and sought to overawe Parliament by riding roughshod over its most obvious rights. All those means by which the Tudors had kept a friendly legislature, were abandoned; and the Stuarts always forced matters to a crisis, and tried to obtain their own way by dictation and by imprisonment of their opponents.

Character
of the
struggle.

But we must carefully discriminate. They did not, any more than the Tudors, deny a place to Parliament in the English Constitution. James himself repudiated one of the Canons of 1606 in which a too subservient Convocation asserted that resistance under any circumstances to the established authority was unlawful; and he also suppressed Dr. Cowell's 'Interpreter,' which asserted that though it was politic to make laws by consent of the whole realm, 'yet simply to bind a prince to or by those laws were repugnant to the nature and constitution of an absolute monarchy' such as he had previously asserted England

to be. The attitude of the two first Stuart kings on the question of the relation of the Crown to Parliament, is fitly depicted in James' letter to the Speaker of the Commons in 1621, in which he informed the House that its members were not to be permitted to meddle with matters of government or with 'mysteries of State.' The king's ministers draw out this position in detail. Northampton tells the Commons that their members were only intended to express the wants of the counties and boroughs for which they sat; and Bacon, when carrying the king's prohibition to discuss the impositions, explained to the indignant House that it might always discuss matters which concerned the subject, enforcing his position by precedents from Elizabeth's reign. In fact, the Tudor and Stuart theory turned the House of Commons into a kind of royal commission for the collection of information on any subject which the executive chose to submit to its consideration. This is at any rate an intelligible position, though it ill suited the rising aspirations of the popular representatives. It followed, without much difficulty, that the kings drew a distinction between certain subjects, on the one side, in which Parliament might participate; and certain others with which it had nothing to do. Thus the quarrels over *taxation* and *legislation* did not turn on the question whether the exclusive right belonged to the king, but where the line should be drawn defining the powers respectively of king and Parliament. The right of Parliament to grant subsidies and to make statutes was not called in question; but the right was being practically annulled by the prerogative powers of levying impositions and issuing proclamations. On the other hand, there were three great questions in which the king denied that Parliament had any right to exercise a voice. *Foreign policy* came under the head of 'mysteries of State,' demanding study and secrecy: *Ecclesiastical affairs* were matters for the royal supremacy: *Ministers* owed their appointment solely to the king and were so entirely his servants that Charles I constantly declared that he and not they would bear all responsibility for what had been done. The actual subjects of contention do not so much matter here. What is of extreme importance is the general attitude of the two parties. The fault of the Commons was that they tried to carry ~~out~~ into practice the theory of the con-

stitution as a balance of powers. The king's political theory was sounder; for it started from the recognition of the fact that in every constitution there must exist some authority armed with the power of saying the final word in a discussion. In the Tudor times this had been the king; after the Revolution of 1688 it became the Parliament. The epoch of the Stuarts represents the transition from one to the other, when executive and legislature were measuring themselves against each other, and the anti-national action of the Crown in its religious and foreign policy convinced the people of the danger of leaving it unchecked. But the only substitute for the king which the leaders of the people had as yet to offer, was a House of Commons 'unguided by any cabinet and undisciplined by any party ties.'

Constitutional lessons of the Commonwealth, 1642-1660.

Negative lessons.

§ 44. The theory of a balance of powers between executive and legislature led in any crisis straight to civil war as the only arbiter; and this occasion proved no exception to the natural evolution of events. From 1642 to 1660 the English Constitution was practically in abeyance; but the expedients which were evoked to fill its place, formed no unimportant element in the development of the future constitution. For, in the first place, the period of the Commonwealth was distinguished by an attempt to change the whole current of English history. As things have worked themselves out, we have a constitution which, containing no fundamental laws unalterable by Parliament, leaves that body therefore the legal sovereign with control of the executive. But had the constitutions projected under the Commonwealth been permanent, the development of our system would have been hampered, if not checked, by fundamental laws, and the written constitution would have been sovereign instead of Parliament; while the executive and legislature would have existed independent of each other, as in the United States at the present day. In the second place, Cromwell was perhaps chiefly hindered by his conservatism. For he fell back on old expedients, and tried, as far as might be, to reproduce the old constitution without those links of historical association which had bound its several parts together, and with that balance of powers which his training in the ranks of the constitutional and legal opposition had led him to regard as the ideal. Thus the *Instrument of Government*

(1653) set up an executive of a Protector and Council with co-ordinate authority, and a Parliament of one chamber independent of the Council, and unable on the one hand to alter the constitution, and on the other hand to be itself adjourned or dissolved for five months without its own consent¹. The refusal of the assembly elected under this scheme to accept it without comment, put an end to Cromwell's first attempt at parliamentary government. He next tried to conciliate a large section of public opinion by a return to the three constituent elements of the old constitution. The opposition of the army forced him to lay aside his intention of accepting the Crown, though the *Humble Petition and Advice* (1656) gave him power to appoint his successor. The House of Lords, however, was to be restored as the 'Other House,' and a number of old and new members were summoned by the Protector with the intention that future vacancies should be filled by the House itself². But this was merely playing at constitutional government. The Protector was not the historical monarchy, and commanded no traditional reverence: the real Lords refused to sit with their spurious fellows, who at the same time contained so many of Cromwell's chief supporters that the Commons were left without sufficient control. Hostile criticism of the new constitution, especially of the powers of the 'Other House,' was only ended by a summary dissolution; and Cromwell reigned supreme till his death. The truth probably was that there were too many antagonistic elements at work to endue any abstract constitution with stability. At the same time, it was a lesson of no small value to future reformers, that neither was England willing to dispense with the framework of her constitution, nor could that framework subsist apart from its historical antecedents.

But the period of the Commonwealth bequeathed other experiences scarcely less valuable than the two already noticed. The abolition of the monarchy deprived the executive of those revenues which, like the feudal incidents, had no meaning apart from the Crown. The expedients which were resorted to in their stead, borrowed as they mostly were from the Dutch, gave hints of which the government of the Restoration was not slow to avail itself. Again, Cromwell's principles of toleration, imperfect and one-sided as they were, were

¹ Gardiner, *Const. Docts. of Puritan Rev.* pp. 314-325.

² *Ibid.* pp. 334-350.

Positive lessons.

the first definite attempt logically to carry out the teaching of the Reformation, and like all principles of liberty, when once allowed, were difficult to go back from. Finally, the constitutions of the Commonwealth, with all their disregard of historical antecedents, gave an example of comprehensive representative government, which it took nearly two centuries for the country to realize. The Chamber set up by the Instrument of Government contained not only 400 members from England, Wales, Jersey, Guernsey and Berwick, but 30 from Scotland and 30 from Ireland in addition. There was a redistribution of seats in England and Wales, 261 members being given to shires and 139 to boroughs, and most of the petty boroughs were disfranchised and their seats given either to shires or to large unrepresented towns. The franchise, while being left to custom which had always regulated it in the boroughs, was in the shires altered from the freehold of the annual value of forty shillings—the qualification since 1430—to a real or personal estate of £200¹. We have to wait until the middle of the eighteenth century before any statesman even suggested so far-reaching a scheme of parliamentary reform, and until 1832 before anything parallel to it could be carried out.

¹ Gardiner, *Const. Docts. of Puritan Rev.* p. 314 et seq. §§ 10, 18.

The settlement of the Restoration.

For Cromwell failed to establish any permanent system of government; and on his death all the classes to whom the maintenance of law and order was more important than liberty, combined to restore the ancient ways. The Stuarts came back amidst a royalist reaction, which seemed to arm them with every power for outdoing even the most arbitrary courses of their predecessors. For not only was the position of the Crown theoretically unchanged, and the whole of the Tudor constitution in Privy Council, Parliament, local government and royal supremacy restored; but the Crown was tied by no conditions, and Charles' reign was dated in a significant manner from his father's death. The Church not unnaturally preached passive obedience to a race of kings who had suffered so much in her cause. Even Parliament followed in the same direction. It abolished the Triennial Act, contenting itself with a recommendation that Parliament should be called at least once in three years; it passed an Act against tumultuous petitions, thus circumscribing one of the most indefeasible rights of the people; and in view of the Militia Bill of the Long Parliament, it

asserted that legislative authority could never be exercised without consent of the king, which was a practical endorsement of the doctrine of non-resistance ; and that the sole command of the armed forces had ever been vested in the king alone, and that neither House of Parliament could pretend to it or could lawfully levy war offensive or defensive against the king. It was the continued existence of this same spirit which later on in the reign caused the rejection of the Exclusion Bill, in which the majority in Parliament faithfully echoed the national voice, and which under James II formed the excuse, if any could be made, for the opinions of the judges as to the dispensing power of the royal prerogative. It was also in the exercise of this theoretically untouched royal prerogative that Charles and James both used the dispensing power to issue declarations of indulgence to Catholic and Protestant dissenters, and that James at his accession collected tonnage and poundage before it had been granted to him for life in the usual way by Parliament. Yet there is no need to under-estimate the results of the Great Rebellion. The executive was deprived of some of the most prominent means of oppression. For Parliament, while restoring the royal power of calling and dissolving the legislature, and leaving the appointment of the judges in the king's hands, not only abolished feudal tenures and incidents together with purveyance, thus taking away from the Crown a large and oppressive source of prerogative revenue ; but also refused to contemplate the revival of the Star-Chamber and the Court of High Commission, leaving as the only method of procedure in-extraordinary cases a bill of pains and penalties, in other words, the action of Parliament itself.

§ 45. The Great Rebellion, then, did not definitely solve the question of the relations of the executive and legislature to each other. All that it can be said to have done in this respect is to have shown that certain solutions, such as the abolition of hereditary monarchy and hereditary aristocracy, were unacceptable to the country. Its work was negative rather than positive. The proper adjustment of relations was yet to be found. For the king still governed nominally by means of the Privy Council, of whose harmony with Parliament there was no guarantee. But even with the still unsettled condition of this all-important question, Charles II and his

Constitutional
results of
the Great
Rebellion,
1660-1688.

brother had no one but themselves to thank for the final catastrophe. In their relations with Parliament they profited by experience; and in nothing can the results of the Great Rebellion be better appraised than in the difference of the methods employed by the later Stuarts in their assault upon constitutional liberties, from those by which their predecessors had provoked the Civil War. Thus, there was no attempt at *legislation without consent of Parliament*. The only use of such a power was in the Declarations of Indulgence which, however, professed to be by virtue of the royal supremacy; and Charles withdrew them in response to the remonstrances of Parliament, while James sought to fortify them with judicial decisions. Nor was there any attempt at *taxation without consent of Parliament*. For on the one side, Parliament strengthened its control over the finances by the acquisition in 1664 of the clerical claim to vote separate supplies, by the confirmation in 1666 of the principle of the appropriation of supplies, and in 1667 of that of the audit of accounts. On the other side, the king preferred to sell himself to France. James' only violation of this principle in the collection of ungranted customs was perhaps justified by the necessity of such a course for the continued prosecution of the trade of the country. Even *ministerial responsibility* to Parliament was acknowledged by the king in his surrender of Clarendon, and in the inability of his pardon to save Danby from impeachment despite the purely personal nature of the act of which he was accused.

Causes of
the Revolution

(1) Insecurity of
individual
liberty,

But here the attention of the Stuarts to the lessons of the Great Rebellion ceased, and in their *violation of the liberty of the subject* they rivalled the most indefensible acts of their predecessors; while in their quarrels with the Church they threw away the one weapon with which their father had honourably if obstinately refused to part. The acts of the early Stuarts had demonstrated the incompleteness of the safeguards of individual liberty. Something was done to remedy this fault under Charles II. Thus, in 1679 a decision of Chief Justice Vaughan released the jury from personal responsibility for their verdicts. In the same year the efforts of Lord Shaftesbury procured the partial safeguard of the Habeas Corpus Act. But these measures by themselves proved of small assistance. By an attack upon the borough corporations the king was able to obtain the nomina-

tion of juries which would give their verdicts for the Crown without intimidation. The action of the Habeas Corpus Act was very partial; for it applied only to criminal charges, and contained no provision to ensure a true return from the gaoler. But the Stuarts had other methods of striking down their victims. The censorship which they maintained over the press muzzled the most formidable engine of free discussion: the indefiniteness of the treason laws enabled them to condemn on the most paltry evidence such opponents as Lord William Russell and Algernon Sidney. But even these would have been of little avail to the Crown unless the appointment of the judges had enabled both Charles and James to maintain an entirely subservient bench. The devotion of the interpreters of the law to the royal cause removed the last safeguard against the capricious tyranny of the executive; while the maintenance of a military force despite all the care of Parliament to reduce it, and especially under the Roman Catholic officers whom James forced into its ranks, formed no slight guarantee against any opposition to the designs of the king.

But the two later Stuart kings committed the capital error of quarrelling with the *Church*, and thereby not only alienated their strongest supporters, but cut away from under their own feet the powerful argument of divine right in which their predecessors had entrenched themselves. The Restoration had been the work of the wealthier classes, who sought to draw tighter the existing bonds of orderly rule. They desired, therefore, to strengthen Parliament and the Church. The Long Parliament of the Restoration, as it was called, found itself in its fervent Anglicanism at one with the minister Clarendon. In their common desire to use the Church as a defence against Roman Catholics on the one side, and radical Puritans on the other, the Commons set themselves to give it a monopoly of rule in the State. The series of enactments known as Clarendon's Code (1661-1665) aimed at banishing Presbyterians from the government of boroughs and the possession of benefices, and depriving them of the ministrations of their preachers. Charles' intrigues with France necessitated similar protective legislation against the Roman Catholics; and in 1673 Parliament passed the Test Act, which in 1678 was applied to all members of Parliament of both Houses, as well as to office holders; and

(2) Attack
of the
Crown
on the
Church.

thus for the first time members of the House of Lords were excluded on account of their religion. Not content with these safeguards, the parliamentary party led by Shaftesbury introduced the Exclusion Bill, but pressing it on from sinister rather than truly patriotic motives, they met the check which they so thoroughly deserved. But the Church scarcely needed this additional safeguard to make her the exclusive body which with the aid of Parliament she had now become. Indeed, so much was this the case that the Puritans no longer claimed, as they had under James I, to be within her pale provided they could obtain certain modifications in her ceremonial. Laud's clear demonstration of the incompatibility of Anglicanism and Calvinism had done its work. The Puritans, from Non-conformists or objectors to conform to certain ceremonials, had become Dissenters from the whole attitude of the Church. The Church could no longer pretend to be entirely national. It was the established form of religion, and the Puritans now stood outside and demanded toleration. The first person to answer that demand was the king, and that king a Stuart, whose father had risked his life for the doctrines and organization of the Church. Charles II, a Roman Catholic probably from the beginning of his reign, hoped to obtain his point by combining the cause of the Roman Catholics with that of the Dissenters. He had promised liberty of conscience in the Declaration of Breda; but the Savoy Conference between Anglicans and Presbyterians, on whom Charles urged a compromise, failed, and Parliament began to restore the Anglican Church in renewed strength. Charles accordingly fell back upon the royal power of dispensation; and in 1663, and again in 1672, he published Declarations of Indulgence. Parliament, however, compelled him to withdraw them both, and answered the second with the Test Act. Nor did a Comprehension Bill in 1668 meet with a different fate. His brother James set to work more resolutely. He re-established the High Commission Court with Judge Jeffreys at its head; he attacked the stronghold of Anglicanism in the shape of the two Universities; and he issued two Declarations of Indulgence. In the first of these he allowed public worship to the Roman Catholics as well as to the Dissenters, who, however, entirely rejected it. His command that the second should be publicly read by the clergy, produced

the petition of the bishops against it, seven of whom were tried for libel and, despite the precautions taken with judges and jury, were acquitted. In the whole history of the time between the Rebellion and the Revolution nothing is more significant than the fact that the strength of the earlier Stuarts thus became the weakness and the ultimate cause of the fall of the later Stuart sovereigns.

§ 46. If proof were required of the unwritten nature of the English Constitution there could be none better than that afforded by the Bill of Rights. There was no attempt to define the fundamental bases of the constitution. It seemed to take for granted that these were sufficiently known; and it limited itself to a declaration of the various points in which they had been violated by the action of the late king. The whole document so far as it concerned the action of the Crown, professed to be merely a declaration of the law as it stood. The importance, then, of the Bill of Rights, like that of Magna Carta, must not be sought so much in its individual provisions, as in the change of situation to which it bore witness. The document marks the end of the struggle which had lasted for just a century between the executive and the legislature; and it signalises the victory of the latter by stamping as illegal many of those modes of action by which the executive had striven to ignore or override its wishes. But there was nothing in the Bill of Rights itself to prevent the recurrence of all those modes of unconstitutional action which had caused the struggle. For the real safeguards we must look to the history of the following years. One thing, however, the Bill of Rights accomplished. By its declaration of the sovereignty of William and Mary it *broke the line of succession*; and though, with regard for tender consciences, it spoke of them as succeeding to the throne rendered vacant by the imagined abdication of King James, yet by this very act it relegated the doctrine of divine right to the grave of shattered ideals. The close connexion of Mary to the late king concealed at the moment the full force of this declaration. It was only when the Act of Settlement went on to nominate the line of the Electress Sophia of Hanover to the ultimate succession, that the entire dependence of the right to the throne on parliamentary recognition was made apparent.

Meanwhile, Parliament had forged other fetters for the Crown.

Triumph
of the legis-
lature
secured by

(1) break
in succes-
sion;

(2) settle-
ment of
revenue;

In settling the *Revenue* which was granted for the king's life, it distinguished between the expenditure for the civil government and the money voted for the maintenance of the armed forces of the Crown, which was only apportioned from year to year. For, the Bill of Rights had declared the illegality of a standing army in time of peace except with consent of Parliament; and the legislature refused to make any provision for military discipline except for the ensuing year. The king, therefore, had only a limited revenue at his disposal; and the recommendation of the Bill of Rights that 'Parliament ought to be held frequently' was assured by the necessity imposed upon the Crown of annual sessions if it wished to obtain the means of maintaining and governing the army. By these means the provision aimed against the levying of money for the Crown 'by pretence of prerogative' was effectually safeguarded. It was no less important to circumscribe the royal right to override parliamentary legislation. The Bill of Rights condemned the royal claim to suspend the laws, and the late developments of the claim to dispense with them. But the grossly abused power of dismissing the judges was left to the king, until the Act of Settlement prescribed that from the accession of the House of Hanover, though their mode of appointment remained untouched, the tenure of their seats should be dependent—not on the whim of the Crown, but—on their own good behaviour, of which Parliament became the critic.

(3) appoint-
ment of
judges;

(4) Cabinet
govern-
ment.

But the action of Parliament, to be effectual, must be organized. If it wished to usurp the position of the king, it must have some substitute to suggest. The abolition of the Crown had been shown to be out of the question. The direct responsibility of the sovereign involved nothing short of a revolution at each disagreement between Parliament and the Crown. It was necessary, therefore, to interpose some responsible organization over which Parliament could maintain a permanent control. But Parliament itself did not represent one prevailing opinion. The struggle over the Exclusion Bill under Charles II had caused politicians to range themselves into two parties according as they supported or opposed the indefeasible right of hereditary succession. The Whigs, to whom William owed his throne, hoped to monopolize all power; but the new king endeavoured, though

with less reason, to maintain the high practical prerogatives of his predecessors, and himself conducted the administration of the government. It became all-important to remove both the individual responsibility of the king, and the ability of the ministers to shelter themselves for their acts behind his commands. The only possible solution of the question was to make the ministers responsible, and to Parliament. William, in his desire to enlist all England in the war with France, chose his ministers indifferently from both the political parties. But the necessity under which he lay of obtaining the consent of Parliament, while it drove him to find all his ministers among members of either House in order to bring as much influence as possible to bear upon Parliament, also brought him to realize the utility of securing the support of that one of the two parties which was most numerous represented in the House of Commons. Thus without in the least degree relaxing his own power of choice, the wish to carry on the French war with greater energy led William, in 1697, to fill all offices with members of the Whig party who were eager for its prosecution. The same reason led Anne to assent to the desire of Godolphin and Marlborough for a number of Whig colleagues; while the wish for the conclusion of peace brought about the substitution of an equally complete body of Tory ministers. Thus, although the appointment of ministers still remained very practically with the Crown, it had to be exercised with some regard to the party which held the majority of votes in Parliament. It is true, as will presently be noted, that Parliament could be more or less manufactured; but in moments of national crisis the worthlessness of these means of influence were frequently demonstrated; so that the Crown not only could not afford, but did not venture to ignore the evident wishes of the nation. The history of *Cabinet Government* is dealt with elsewhere. Here it is necessary to notice that in it lay the solution of the question between the legislature and the executive; that under William III and Anne the solution had advanced a very little way; for accident and not principle had occasionally called into existence a number of ministers of homogeneous opinions, who entirely repudiated any corporate responsibility. This corporate responsibility, which is of the essence of the Cabinet

system, only came into being when George I, for obvious reasons, absented himself from the discussions of his ministers, and the body of ministers consequently became dominated over by one of themselves to whom the rest practically owed their nomination. The system was only gradually worked out to its modern perfection; but long before the personal action of the Crown was eliminated, the necessity was recognized of a close harmony between the ministers and the majority in Parliament; while the clumsy method of punishment by impeachment gave way to the less severe but equally effective withdrawal of parliamentary support from an unpopular ministry.

Results on
the royal
prerogative.

The full effect of these safeguards in preventing an undue extension of the power of the executive may be realized from an examination of the present use of the royal prerogative. This has been elsewhere described as 'the discretionary power of the Crown.' But inasmuch as the Crown acts solely by advice of its ministers, the royal prerogative is a reserve power in the hands of the Cabinet of the day, and its use is regulated by those conventions of the constitution whose business it is to stand between the several members of the sovereign body of the Crown in Parliament and a breach of the law. This may be illustrated in detail. Among the methods which William III employed to keep the executive authority in his own hands was the royal right of placing a *veto* on bills that had been accepted by both Houses of Parliament. He could no longer bully the Commons as the Tudors and early Stuarts had done, and in the state of popular feeling his method of influencing them indirectly met with only qualified success. Consequently his use of the veto on no less than four occasions—a bill for securing the independence of the judicial bench (1692)¹; a triennial bill (1693)²; a place bill (1693)³; and an election bill (1696)⁴—exceeded any previous example. Nor did after-events make it less unique; his successors forged new means of influencing Parliament, and, except indirectly, dared not oppose the constitutionally expressed wishes of the nation. Thus, with the single exception of a Scotch Militia Bill in 1707, the veto of the Crown has not been used in the British Isles for nearly 200 years, although its exercise is not altogether unknown in matters which

¹ Macaulay, *Hist. of Eng.* iii. 219-20.

² *Ibid.* iii. 410.

³ *Ibid.* iv. 49.

⁴ *Ibid.* iv. 148.

emanate from colonial Parliaments. Here there is practically no scope for the personal discretion of the Crown. Nor in the old prerogative power of *summoning Parliament* has anything been left to the Crown. The Triennial Act, which William vetoed, was passed in 1695; and, while the law henceforth demanded a Parliament at least once in three years, the necessity of obtaining supplies for the army ensured annual sessions. This period of three years was extended to the seven of the present time by the Septennial Act of 1716; whose legality has been often called in doubt. For, the Parliament which passed it, in fear that a general election so soon after the accession of the Hanoverians might be fraught with danger, applied its provisions not only to future Parliaments but to the existence of the sitting House. This was no doubt a breach of the confidence of their constituencies on the part of individual members and an unprecedented use of the powers of Parliament as a body; but since the law courts could take no cognizance of the action, it was not illegal, and indeed its enactment has been cited as the most conclusive proof of the omnipotence of the sovereignty of Parliament in the English Constitution¹. Both these weapons, then, have for some time been removed from the armoury of the executive. Far otherwise has it been with the Crown's *power of deciding when Parliament shall be dissolved*. A dissolution of Parliament has been described as an appeal from the legal to the political sovereign, from the ministry and Parliament of the day to the constituencies which exercise the rights of the people². Since the Revolution of 1688 there have been periods, such as the reign of William III, when Cabinet government was as yet imperfect, and the early years of George III during his struggle with the Whig oligarchy, in which the king used this power of dissolution as a threat. But as soon as the system of administration by a homogeneous Cabinet was established, a dissolution only became a means of ascertaining whether the ministry in power commanded the confidence of the people, and the king was alone justified in exercising his prerogative if he had reason to believe that the original harmony between Parliament and people had been broken. Thus, in 1784, when George III took the first pretext for dismissing the Coalition Ministry of Fox and North, and

¹ Dicey, *Law of Const.* p. 45.

² *Ibid.* p. 360.

maintained the younger Pitt as his minister for three months in the face of a hostile Parliament, his use of the power of dissolution when the opposition had discredited itself, was entirely justified by the large majority returned to the next Parliament in support of William Pitt. And when in 1834 William IV dismissed Lord Melbourne in favour of Sir Robert Peel, and dissolved Parliament in the hope which proved to be vain, that the country would return a majority for his new minister, the justification of his use of the royal prerogative lies in the king's belief that the old Parliament did not possess the confidence of the constituencies.

The prerogative for which the king fought most strenuously was his *power of the choice of ministers*; and even after he had been compelled to relinquish the system of an inner and outer Cabinet or the practice of keeping one royal spy in the person of the Lord Chancellor, he strove to accept or reject as his ministers the nominees of the dominant party. Thus, George III by his demand of certain pledges drove the Ministry of All the Talents to resignation in 1807. The dismissal of Lord Melbourne in favour of Sir Robert Peel (1834) has just been noticed. In 1839 Peel, though possessing the confidence of the country, was unable to assume power because the Queen refused to part with the ladies of the bed-chamber who were near relatives of the outgoing ministry. But the Reform Act had made it impossible for the Crown to uphold its ministers in the face of a hostile Parliament. The elections of 1841 went strongly in favour of Sir Robert Peel; a compromise was arrived at, and the Tories came into office. But although the Crown has thus practically surrendered the power of the choice of ministers, it still plays an important part *in the conduct of administration*. Its right to be consulted was definitely asserted when, in 1851, the Queen concurred with the Prime Minister, Lord John Russell, in the dismissal of Lord Palmerston, who, as Foreign Secretary, had given assurances of friendship to the French Government when the Cabinet had decided to maintain a neutral attitude. And there are moments when the personal discretion of the Crown may assume an inestimable importance. For in the absence of any one definite head of the dominant party it becomes incumbent on the sovereign to choose between the rival candidates for leadership. Of the influence of the

long experience of an individual sovereign something has been already said. It may be noted in conclusion that this divorce of the ornamental and practical heads of the English administration relieves the real guide of the executive of half his work, and removes from the competitors for power the men of second-rate ambition even if of first-rate ability, who are attracted by the benefits to be obtained from the highest office rather than by a feeling of devotion to the public service.

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CHAPTER VII.

ADMINISTRATION OF JUSTICE.

English
system of
law.

§ 47. THE English system of Jurisprudence is the only one in Western Europe which is of native growth. In France, Italy and Spain the basis of the national legal code was the Roman law. In England alone the influence of that law, although the exact amount of it is a matter of dispute, was at any rate of comparatively late introduction, and in any case certainly did not form the basis. Thus in England alone is there a distinction between *Common Law* and *Equity*. An historical investigation will make comparatively clear the practical difference between these two, which legal definitions have found it impossible to determine.

The earliest form of the *Common Law* of the land was in the shape of local, tribal or national customs which have given it the name of *Customary Law*. But for their validity such customs demanded judicial recognition, whether the judge was the body of free suitors or an individual representative of the royal authority; and such judicial recognition was obtained by means of three sets of courts—(a) national, those of the Hundred and Shire, (b) private, those of the Thegns and of Lords of Manors, (c) municipal, those of the chartered and privileged Boroughs.

(A) Na-
tional
Courts.

Hundred.

Its Court.

We may for the present omit the Township, which was in any case a social rather than a political division, whose affairs were managed by a gemot or assembly rather than by a regularly constituted court. The smallest administrative division recognized by the early constitution was the *Hundred*. It was a district containing several Townships, and its business was transacted in a monthly court composed of all individual landowners within the district together with the parish priest,

township-reeve and four elected men from each township to represent the village communities which held their lands in common. The executive officials were a deputy of the shire-reeve, an elected Hundreds-ealdor and, at any rate towards the close of Anglo-Saxon times, a standing committee of twelve 'Senior Thegns' to administer the justice which in theory belonged to the whole body of lawful attendants or suitors at the court. These officials exercised both criminal and civil jurisdiction, and it became the duty of the twelve Senior Thegns to present prisoners for trial in the Shire Court.

So far our evidence is clear. But there are two questions connected with the origin of the Hundred, which are not so easy to determine. There are, in the first place, at least four theories as to the primitive *meaning of the name*. Of these two derive it from a *personal* basis, regarding the Hundred as originally either the district which furnished a hundred warriors to the host or tribal army, or the primitive settlement of a hundred warriors. The other two give the term a *territorial* meaning as pointing either to a primitive division of a hundred hides of land, or to the same number of hides from each of which a warrior was due to the tribal army. On the whole we may surmise that, whereas originally the Hundred probably represented a personal numerical division of the tribe, by historical times it had ceased to be numerical and was composed of representatives and descendants of the original bodies or clans, as we may perhaps venture to call them. In some cases these clans would be more, in others less than the original number; but the name, when we first meet it in an historical connexion, expresses a personal rather than a territorial relation.

A far greater difficulty is presented by the question of the *origin of the Hundred in England*. The first definite mention of the division on English soil does not occur until the reign of Eadgar, whose 'Ordinance of the Hundred' has been asserted to be the creation of the district. The generally accepted belief connects the Hundred of the days of Eadgar with the division of the *Pagus* which plays so important a part in Tacitus' description of the Germanic tribes. The evidence, however, for this belief is only inferential. In the first place, Tacitus in his sketch of the constitutional system of the Germanic tribes,

mentions a two-fold organization which is common to all early civilization, for purposes of internal police or the administration of justice, and for defence against the warlike attacks of hostile tribes. The former is organized in a triple gradation of *Civitas*, *Pagus* and *Vicus*, whether the tribe has adopted royalty or is still under the more common rule of a council of chiefs: while warfare is carried on by a double arrangement in which the chief and his *comitatus*, or band of personal followers and dependents, are supplemented by contingents drawn from the administrative sub-divisions of the tribe. But in each case the organization centres round the division of the *Pagus*, which for justice supplies a hundred assessors to the chief and for war

¹ Tacitus' *Germania*, § 6, 12. *Sel. Chart.* pp. 56-7.

² *Germania*, § 7. *Sel. Chart.* p. 56.

³ *Sel. Chart.* pp. 69-70.

a hundred warriors to the host¹. We need not believe that in either case the number is to be pressed. The hundred assessors and warriors may very well be all fully qualified members of the *Pagus*, whose judicial function may be expressed by the later formula that 'the suitors are the judges,' and who for war would be identical with the bands which Tacitus elsewhere describes as drawn up on the basis of local or fraternal connexion in the battle array². For more than 500 years after Tacitus direct evidence is wanting. But, meanwhile, the records of the kindred tribe of the Franks in their new home in Gaul tell us of the existence in the fourth century of the court of the *Mallus*, the ordinary court of justice, which was presided over by an officer called *Centenarius*, supported by all fully qualified landowners of the district; while two centuries later the Laws of Childebert and Clothair mention the local division of the *Centena*³ which, it has been conjectured, formed the basis of the contemporary police system in Gaul.

Our first proof upon English soil is drawn from the *Hundred divisions* as they may be seen on many county maps at the present day. From an examination of these we find that the Hundreds are smallest and therefore most numerous in the portions of the country which were first settled by the English, namely the south and south-east, whereas they increase in size towards the west. From this it has been argued that the Hundreds represent the early form of English settlements. So long as land sufficed for the needs of the population the tribesmen settled down where they first landed, and only the more adventurous spirits sought an outlet to their energies in further

conflict with the Britons—a conflict to be rewarded by the acquisition of more extensive tracts of land. Again, the post-Conquest chronicler, William of Malmesbury, has preserved for us the tradition that Ælfred instituted among other things the arrangement of the land into hundreds and tithings. Now, Ælfred was one of the early English lawgivers to whose initiative a busy tradition assigned the majority of early English institutions, so that the evidence of the gossiping monk is only of such value as may consist in the fact that the people nearest to the time at any rate believed the Hundred to have existed as early as the reign of Ælfred—that is, more than half a century before the first direct proof of its existence. Our final proofs of the establishment of the Hundred before the days of Eadgar are in two laws, the first of which is of the time of Eadward the Elder and ordains that ‘every reeve have a gemot always *once in four weeks*’,¹ whereas Eadgar’s ‘Ordinance of the Hundred’ determines ‘that they meet always within four weeks’.² The second lay is less explicit. Æthelstan says, ‘Let there be named in every reeve’s manung (i. e. district) as many men as are known to be unlying that they may be for witness in every suit’³; but a law of Eadgar may give us the interpretation, which bids that ‘witness be appointed . . . to every Hundred’.⁴ Finally, an examination of Eadgar’s ‘Ordinance of the Hundred’ itself may lead to a similar conclusion, for it seems to connect the district with the police system in so elaborate a fashion as almost of necessity to imply the previous existence of the district name.

But for the perfectly satisfactory interpretation of our scanty evidence one further point is necessary. If we are to connect historically the Pagus of Tacitus with the Hundred of Eadgar, the absence of any previous mention of the name must in some way be explained. It is conjectured that the old clan divisions, which had probably played so great a part in the settlement, declined in importance after the conquest of Britain, until circumstances caused their revival in the troublous days of the ninth century. The Pagus of Tacitus was, as we have seen, a division for the two-fold purpose of War and Justice. But after the beginning of the migration to Britain and until the settlement was complete, there must have been almost continuous war; the value of the ordinary freeman, who was now

¹ *Sel. Chart.*

p. 64.

cap. 11.

² *Ibid.*

p. 70, § 1.

³ *Ibid.*

p. 66.

⁴ *Ibid.*

p. 72.

Supple-

ment,

cap. 3.

becoming an industrious farmer, would naturally fall in comparison with that of the professional warrior, the member of the royal comitatus. Thus the organization which had hitherto supplied the host would tend to lose its meaning. Again, in the administration of justice the old courts of the Hundred may have been almost monopolized, or at least overlaid, by the gift of estates in bocland to the Thegns with rights of jurisdiction over the inhabitants. Such grants of 'sac and soc,' as they were technically called, carried with them exemption from attendance at the local Hundred court and very rarely seem to have extended further. The Hundred no doubt owed its revival, if revival it was, about the time of Ælfred, to the Danish invasions; for the spasmodic character of the Danish attacks paralyzed the effect of a professional army and necessitated the maintenance of a national militia. For this purpose it would be natural to revert to the old methods which, though decaying and ineffective, still remained intact; and we have the assurance of the Anglo-Saxon Chronicle that Ælfred in 894 reorganized the fyrd. In the matter of judicial and general local administration also the Danes in many cases destroyed or supplanted the land-owning class and with them their rights of private jurisdiction. Thus, on the reunion of England by Eadward the Elder and his immediate successors it would be found easier to restore and strengthen on their original basis all the means of order and police for the purpose of coping with and subduing the freer elements introduced into the country by the Danish settlers.

But within the last few years these conjectures have been met by an array of severe, if purely negative, criticism. M. Fustel de Coulanges, by a masterly analysis of the few sentences in which Tacitus speaks of the system of justice among the Germans, has shown that it is at any rate probable that the princeps who administered justice with the aid of a hundred comites, was an itinerant judge appointed by the national assembly and taking round with him, after the fashion of all Roman Judices, a chosen band of freemen (plebs as distinguished from principes) who acted as his council and, in the absence of documents, personally attested his decisions¹. This disposes entirely of the system of popular justice which plays so large a part in the history

¹ *Recherches sur quelques problèmes d'histoire*, pp. 361-71.

of the origin of English institutions. No less effectually does M. Coulanges explain away the analogy of the Mallus. There is nothing to show that it was an assembly, or that a system of popular judgment prevailed. It was a tribunal in which justice was rendered by the royal officer, and to it were amenable not only the Franks but the Romano-Gallic inhabitants as well¹. The judge in the Mallus was the Comes, and for administrative purposes he appointed officials who are called by various Roman names. Among these is found the centenarius, who perhaps at first was a military officer, the equivalent of the centurio, and was then turned into a civil official with powers of police². The centenarius may well have existed before the centena, the division over which he is supposed to have presided and of whose existence there is no evidence earlier than the eighth century. The edicts of Childebert and Clothair are copies of the ninth century; the names of the kings to whom the edicts are assigned are purely arbitrary; and the centena seems to be a personal division for purposes of police³. On English soil the early history of the Hundred is mere conjecture and must be taken, as the saying is, for what it is worth. Perhaps M. Coulanges' conclusion as to the growth of the continental centenae may apply equally to England. They were formed gradually by the people themselves to meet their growing needs, and were then, in the eighth century at the earliest, adopted and regulated by the central government. It may, however, be pointed out that, in his criticism of Tacitus, M. Coulanges has done nothing to explain the coincidence of numbers between the warriors from each pagus and the judicial assessors of each princeps; while the whole system of itinerant justice seems to denote an organization in advance of that which, from the rest of his account, Tacitus would lead us to expect among the German tribes.

Above the Hundred came the division of the *Shire* or, as it *Shire*. came to be called in Norman times, the County. The organization of England into these important units may be described as the result of three separate movements. The origin of the system is to be traced to Wessex, where it was (1) *natural and indigenous*, representing either the divisions of early settlements, such as the folk of the Dorsaetas, Wilsaetas and Sumersaetas; or the amalgamation of successive conquests, such as were

¹ *Recherches sur quelques problèmes d'histoire*, pp. 398-402.

² *La Monarchie Franque*, pp. 224-5.

³ *Ibid.* pp. 191-5.

commemorated in the continued though dependent existence of Kent, Sussex, Surrey, Middlesex or Essex. In all these cases the absorption of the individual folks or kingdoms into the larger whole of the West-Saxon rule was accompanied by the preservation of the old folkmoot and methods of administration, while the officials were brought into intimate contact with the central government of the growing kingdom. The date of the completion of this organization in Wessex is doubtful. Bede talks of the division of Wessex into dioceses, while his contemporary, the West-Saxon King Ine, speaks in his Laws of the *scirman*¹, of an ealdorman forfeiting his shire², and of a dependent stealing away into another shire³, so that the West-Saxon shires, which are alone in question for the moment, may be dated as early as the end of the seventh century. The convenience of this intermediate division was bound to cause its spread, though, as events proved, on slightly different principles from those which had obtained in Wessex. For example, Mercia was originally an aggregation of five regions representing the early settlements of mid-English folk, which Penda drew together into a powerful kingdom. Theodore had attempted to retain the old divisions in the four dioceses into which he organized the midland Church. But after the reconquest of Mercia by Eadward the Elder from the Danes, the country was reorganized in accordance with the arrangements which were in vogue in Wessex, with the difference that (2) *artificial* instead of natural divisions were produced; for a central spot was chosen as the place of rule, and a more or less arbitrary line was drawn about it in utter disregard of the boundaries set by geography or race. Of this difference a proof remains to the present day; for, whereas in the southern shires the names of the shire and of its chief town seldom correspond, the invariable coincidence of the two in the midlands preserves the fact of the previous existence of the town. A third and smaller class of the English shires is formed by those which may be described as (3) *natural, but of late formation*. These are the shires of Northumbria and East-Anglia, each of them with a separate history, which, though interesting in itself, is not important for our present purpose. The dissimilarity of origin both as to time and circumstances of the various shires made no difference in the methods of

¹ *Sel. Chart.*

p. 61,

cap. 8.

² *Ibid.*

cap. 36.

³ *Ibid.*

cap. 39.

their administration. In all, affairs were managed by a half-yearly court whose constituents were the individual landholders in the shire, though perhaps later their place may have been taken by the twelve Senior Thegns from each Hundred; and from each township the priest, reeve and four men whom we have seen attending at the court of the Hundred. The officials with whom lay the conduct of the administration and the initiative of business, were the Ealdorman, the Sheriff and the Bishop, each of whom in his place will deserve a detailed description.

The greatest class of early English dignitaries were the *Ealdormen*, for they were the representatives and in many cases the descendants of the kings of the now conquered folks. This origin had three important results. In the first place, as a national officer an Ealdorman was nominated, or rather perhaps co-opted, by the king and the Witan in conjunction; for he was a member of the Witan. To this position also he owed his military leadership of the forces of the shire; while, thirdly, under each Ealdorman were grouped several shires very much after the pattern of the old 'heptarchic' kingdoms. Indeed, there were probably never more than seven Ealdormen in England at a time. This system of ealdormanic or provincial rule was begun after the consolidation of England under Eadward the Elder. Thus, Æthelstan formed the ealdormanries of East-Anglia and Essex; Eadwig those of Northumbria and Mercia; while Eadgar divided the West-Saxon kingdom into three parts, known respectively as the Western, Central and Eastern Provinces, in the latter of which the Archbishop of Canterbury was too powerful to be rivalled; and finally Cnut, a foreigner and not a representative of the West-Saxon house, for the first time gave the whole of Wessex out of the hands of the king. It was this government of Godwine, together with Mercia, Northumbria and East Anglia, which made up the four ealdormanries into which Cnut is generally said to have divided England to its harm. It will appear, however, that his work was little more than a continuation of the policy of the West-Saxon kings who had preceded him. But whoever was to blame, the work of Ælfred and Eadward the Elder was utterly undone by their successors, whose policy merely perpetuated the old provincial divisions

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either case the number is to be pressed. The hundred assessors and warriors may very well be all fully qualified members of the *Pagus*, whose judicial function may be expressed by the later formula that 'the suitors are the judges,' and who for war would be identical with the bands which Tacitus elsewhere describes as drawn up on the basis of local or fraternal connexion in the battle array². For more than 500 years after Tacitus direct evidence is wanting. But, meanwhile, the records of the kindred tribe of the Franks in their new home in Gaul tell us of the existence in the fourth century of the court of the *Mallus*, the ordinary court of justice, which was presided over by an officer called *Centenarius*, supported by all fully qualified landowners of the district; while two centuries later the Laws of Childebert and Clothair mention the local division of the *Centena*³ which, it has been conjectured, formed the basis of the contemporary police system in Gaul.

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conflict with the Britons—a conflict to be rewarded by the acquisition of more extensive tracts of land. Again, the post-Conquest chronicler, William of Malmesbury, has preserved for us the tradition that Ælfred instituted among other things the arrangement of the land into hundreds and tithings. Now, Ælfred was one of the early English lawgivers to whose initiative a busy tradition assigned the majority of early English institutions, so that the evidence of the gossiping monk is only of such value as may consist in the fact that the people nearest to the time at any rate believed the Hundred to have existed as early as the reign of Ælfred—that is, more than half a century before the first direct proof of its existence. Our final proofs of the establishment of the Hundred before the days of Eadgar are in two laws, the first of which is of the time of Eadward the Elder and ordains that ‘every reeve have a gemot always *once in four weeks*,’ whereas Eadgar’s ‘Ordinance of ¹*Sel. Chart.* the Hundred’ determines ‘that they meet always within four ^{p. 64,} weeks.’ ^{cap. 11.} The second law is less explicit. Æthelstan says, ²*Ibid.* ‘Let there be named in every reeve’s manung (i. e. district) as ^{p. 70, § 1.} many men as are known to be unlying that they may be for witness in every suit’; but a law of Eadgar may give us the ³*Ibid.* interpretation, which bids that ‘witness be appointed . . . to ^{p. 66.} every Hundred.’ Finally, an examination of Eadgar’s ‘Ordin- ⁴*Ibid.* ance of the Hundred’ itself may lead to a similar conclusion, ^{p. 72.} for it seems to connect the district with the police system in so ^{Supple-} elaborate a fashion as almost of necessity to imply the previous ^{ment,} existence of the district name. ^{cap. 3.}

But for the perfectly satisfactory interpretation of our scanty evidence one further point is necessary. If we are to connect historically the Pagus of Tacitus with the Hundred of Eadgar, the absence of any previous mention of the name must in some way be explained. It is conjectured that the old clan divisions, which had probably played so great a part in the settlement, declined in importance after the conquest of Britain, until circumstances caused their revival in the troublous days of the ninth century. The Pagus of Tacitus was, as we have seen, a division for the two-fold purpose of War and Justice. But after the beginning of the migration to Britain and until the settlement was complete, there must have been almost continuous war; the value of the ordinary freeman, who was now

becoming an industrious farmer, would naturally fall in comparison with that of the professional warrior, the member of the royal comitatus. Thus the organization which had hitherto supplied the host would tend to lose its meaning. Again, in the administration of justice the old courts of the Hundred may have been almost monopolized, or at least overlaid, by the gift of estates in bocland to the Thegns with rights of jurisdiction over the inhabitants. Such grants of 'sac and soc,' as they were technically called, carried with them exemption from attendance at the local Hundred court and very rarely seem to have extended further. The Hundred no doubt owed its revival, if revival it was, about the time of Ælfred, to the Danish invasions; for the spasmodic character of the Danish attacks paralyzed the effect of a professional army and necessitated the maintenance of a national militia. For this purpose it would be natural to revert to the old methods which, though decaying and ineffective, still remained intact; and we have the assurance of the Anglo-Saxon Chronicle that Ælfred in 894 reorganized the fyrd. In the matter of judicial and general local administration also the Danes in many cases destroyed or supplanted the land-owning class and with them their rights of private jurisdiction. Thus, on the reunion of England by Eadward the Elder and his immediate successors it would be found easier to restore and strengthen on their original basis all the means of order and police for the purpose of coping with and subduing the freer elements introduced into the country by the Danish settlers.

But within the last few years these conjectures have been met by an array of severe, if purely negative, criticism. M. Fustel de Coulanges, by a masterly analysis of the few sentences in which Tacitus speaks of the system of justice among the Germans, has shown that it is at any rate probable that the princeps who administered justice with the aid of a hundred comites, was an itinerant judge appointed by the national assembly and taking round with him, after the fashion of all Roman Judices, a chosen band of freemen (plebs as distinguished from principes) who acted as his council and, in the absence of documents, personally attested his decisions¹. This disposes entirely of the system of popular justice which plays so large a part in the history

¹ *Recherches sur quelques problèmes d'histoire*, pp. 361-71.

of the origin of English institutions. No less effectually does M. Coulanges explain away the analogy of the Mallus. There is nothing to show that it was an assembly, or that a system of popular judgment prevailed. It was a tribunal in which justice was rendered by the royal officer, and to it were amenable not only the Franks but the Romano-Gallic inhabitants as well¹. The judge in the Mallus was the Comes,¹ and for administrative purposes he appointed officials who are called by various Roman names. Among these is found the centenarius, who perhaps at first was a military officer, the equivalent of the centurio, and was then turned into a civil official with powers of police². The centenarius may well have existed before the centena, the division over which he is supposed to have presided and of whose existence there is no evidence earlier than the eighth century. The edicts of Childebert and Clothair are copies of the ninth century; the names of the kings to whom the edicts are assigned are purely arbitrary; and the centena seems to be a personal division for purposes of police³. On English soil the early history of the Hundred is mere conjecture and must be taken, as the saying is, for what it is worth. Perhaps M. Coulanges' conclusion as to the growth of the continental centenae may apply equally to England. They were formed gradually by the people themselves to meet their growing needs, and were then, in the eighth century at the earliest, adopted and regulated by the central government. It may, however, be pointed out that, in his criticism of Tacitus, M. Coulanges has done nothing to explain the coincidence of numbers between the warriors from each pagus and the judicial assessors of each princeps; while the whole system of itinerant justice seems to denote an organization in advance of that which, from the rest of his account, Tacitus would lead us to expect among the German tribes.

Above the Hundred came the division of the *Shire* or, as it *Shire*. came to be called in Norman times, the County. The organization of England into these important units may be described as the result of three separate movements. The origin of the system is to be traced to Wessex, where it was (1) *natural and indigenous*, representing either the divisions of early settlements, such as the folk of the Dorsaetas, Wilsaetas and Sumersaetas; or the amalgamation of successive conquests, such as were

¹ *Recherches sur quelques problèmes d'histoire*, pp. 398-402.

² *La Monarchie Franque*, pp. 224-5.

³ *Ibid.* pp. 191-5.

commemorated in the continued though dependent existence of Kent, Sussex, Surrey, Middlesex or Essex. In all these cases the absorption of the individual folks or kingdoms into the larger whole of the West-Saxon rule was accompanied by the preservation of the old folkmoot and methods of administration, while the officials were brought into intimate contact with the central government of the growing kingdom. The date of the completion of this organization in Wessex is doubtful. Bede talks of the division of Wessex into dioceses, while his contemporary, the West-Saxon King Ine, speaks in his Laws of the *scirman*¹, of an ealdorman forfeiting his shire², and of a dependent stealing away into another shire³, so that the West-Saxon shires, which are alone in question for the moment, may be dated as early as the end of the seventh century. The convenience of this intermediate division was bound to cause its spread, though, as events proved, on slightly different principles from those which had obtained in Wessex. For example, Mercia was originally an aggregation of five regions representing the early settlements of mid-English folk, which Penda drew together into a powerful kingdom. Theodore had attempted to retain the old divisions in the four dioceses into which he organized the midland Church. But after the reconquest of Mercia by Eadward the Elder from the Danes, the country was reorganized in accordance with the arrangements which were in vogue in Wessex, with the difference that (2) *artificial* instead of natural divisions were produced; for a central spot was chosen as the place of rule, and a more or less arbitrary line was drawn about it in utter disregard of the boundaries set by geography or race. Of this difference a proof remains to the present day; for, whereas in the southern shires the names of the shire and of its chief town seldom correspond, the invariable coincidence of the two in the midlands preserves the fact of the previous existence of the town. A third and smaller class of the English shires is formed by those which may be described as (3) *natural, but of late formation*. These are the shires of Northumbria and East-Anglia, each of them with a separate history, which, though interesting in itself, is not important for our present purpose. The dissimilarity of origin both as to time and circumstances of the various shires made no difference in the methods of

¹ *Sel. Chart.*
p. 61,
cap. 8.
² *Ibid.*
cap. 36.
³ *Ibid.*
cap. 39.

their administration. In all, affairs were managed by a half-yearly court whose constituents were the individual land-holders in the shire, though perhaps later their place may have been taken by the twelve Senior Thegns from each Hundred; and from each township the priest, reeve and four men whom we have seen attending at the court of the Hundred. The officials with whom lay the conduct of the administration and the initiative of business, were the Ealdorman, the Sheriff and the Bishop, each of whom in his place will deserve a detailed description.

The greatest class of early English dignitaries were the *Ealdormen*, for they were the representatives and in many cases the descendants of the kings of the now conquered folks. This origin had three important results. In the first place, as a national officer an Ealdorman was nominated, or rather perhaps co-opted, by the king and the Witan in conjunction; for he was a member of the Witan. To this position also he owed his military leadership of the forces of the shire; while, thirdly, under each Ealdorman were grouped several shires very much after the pattern of the old 'heptarchic' kingdoms. Indeed, there were probably never more than seven Ealdormen in England at a time. This system of ealdormanic or provincial rule was begun after the consolidation of England under Eadward the Elder. Thus, Æthelstan formed the ealdormanries of East-Anglia and Essex; Eadwig those of Northumbria and Mercia; while Eadgar divided the West-Saxon kingdom into three parts, known respectively as the Western, Central and Eastern Provinces, in the latter of which the Archbishop of Canterbury was too powerful to be rivalled; and finally Cnut, a foreigner and not a representative of the West-Saxon house, for the first time gave the whole of Wessex out of the hands of the king. It was this government of Godwine, together with Mercia, Northumbria and East Anglia, which made up the four ealdormanries into which Cnut is generally said to have divided England to its harm. It will appear, however, that his work was little more than a continuation of the policy of the West-Saxon kings who had preceded him. But whoever was to blame, the work of Ælfred and Eadward the Elder was utterly undone by their successors, whose policy merely perpetuated the old provincial divisions

the existence of which prevented the consolidation of the country. Indeed, the last century of early English rule, from the accession of Eadgar onwards, is merely a record of the struggle for power of rival ealdormen. Not but that the kings made efforts to curb their power. In anticipation of the policy which proved so fatal to the Plantagenets in their later generations, they sought to connect the ealdormen by marriage with the royal family. Again, they recalled into existence old divisions such as that of Northumbria into Bernicia and Deira, or they separated off from the greater provinces smaller governments, such as the Hwiccas and Magesaetas from Mercia. As a third means they secured the appointment of royal favourites and even of foreigners who should be dependent on the king alone. Such were, under Æthelred, his favourites Ælfric who was placed over the Central Provinces, and Eadric Streona over Mercia; under Cnut, the Danes, Eric in Northumbria, Thurkil in East-Anglia, and, most important of all, the semi-Dane and royal favourite, Godwine, in Wessex. But the effect of this was merely to change the hereditary ealdormen into official Earls corresponding to the Danish Jarls, while there is no sign that the power of the office was in any way diminished. Finally, the kings would occasionally leave an ealdormanry in abeyance for a time and merely appoint a High Reeve over the province, whose authority was limited to the safeguarding of the royal interests. But provincial feeling was for the present far too strong, and the success of Godwine's family is sufficient proof of the risk incurred by a policy whose original object had been the easier administration of the united kingdom by the guarantee of ancient customs, laws and liberties.

Changes
produced
by Norman
Conquest.

§ 48. Among the measures adopted by the Conqueror for retaining the old English constitution, so far as he could understand it, was the maintenance, if not the revival, of the national courts of Hundred and Shire. Nor was this a mere pretence. The ill-doings of William II, however they affected the local courts, evoked from his successor an additional promise of the recognition of old customs in the matter. The compilation called the 'Laws of Henry I' shows us the courts apparently with the same constituent elements as before the Conquest: they used the old procedure of witness, compurgation and ordeal, and in principle the suitors still remained the

expounders of local customary law. But the different circumstances of the Norman rule, especially the predominance of the royal power and the introduction of feudal law and ideas, were bound to work changes in the ancient system, and ultimately, as events proved, to supersede and thus destroy it. The most important and far-reaching of these changes may be grouped under four heads. In the first place, the Ealdorman or Earl, as he had come to be called, together with the Bishop, disappeared from the court. The Norman Earls were great feudal lords whose only connexion with the shire or county from which they might take their name was the *tertius denarius* or third part of the profits of jurisdiction as an income for the support of the Earl's dignity. This, however, soon ceased. Very rarely was an Earl appointed Sheriff even in his own county, and then only with restrictions on his power as Sheriff. The title was from the first bestowed by patent or definite grant specifying the mode of descent, and women were in many cases allowed to transmit it to their husbands.

(1) Disappearance of Ealdorman and Bishop.

But there were a few exceptional cases in which these principles did not hold good. These were the *Counties Palatine*, as they were called, certain districts, mostly borderlands, in which, for purposes of defence or as matter of rare privilege, the Earl enjoyed royal rights subject to the suzerainty of the Crown. William I in the early years of his rule, and in contrast with his later policy, set up four such governments—*Shropshire* under Roger Montgomery, which after the treason of his son, Robert of Belesme, was forfeited by Henry I; *Chester* under Hugh Lupus of Avranches, on the extinction of whose direct line under Henry I the grant was continued to a distant kinsman until 1301 when it was annexed to the Crown, and, retaining its Palatine character till 1536, its earldom became and has continued a title of the Prince of Wales; *Kent* granted to William's half-brother Odo Bishop of Bayeux, but forfeited for Odo's rebellion in 1082; and *Durham* under its Bishop, which retained its privileged position down to 1836. As a proof of the completely separate character of the government of these districts, it may be mentioned that Chester was not represented in Parliament until the reign of Henry VIII, nor Durham until that of Charles II (1675). There are smaller instances of similar governments in *Hexhamshire*, which

Counties Palatine.

remained a County Palatine under the Archbishop of York until its union with Northumberland in 1571; *Pembrokeshire*, which kept its privileges from its conquest by Henry I until 1536; and the *Isle of Ely*, which was a royal franchise under its Bishop from Henry I to 1538. But the only great instance of the grant of these royal privileges on a large scale after the Conqueror, was that of *Lancaster*, given by Edward III to his cousin the Earl, or Duke as he shortly afterwards became. In the person of Henry IV the Duke of Lancaster became also king; but it was not until the attainder of Henry VI that it was definitely united to the Crown as such, and this, though confirmed by an Act of Henry VII, left it 'under a separate guiding and governance from the other inheritances of the Crown.' Thus in the counties of Chester, Durham and Lancaster, which are alone of importance, the king's writs did not run: the sole administration of justice lay with the Earl in whose name writs were issued and offences punished as against his peace. They all had Courts of Common Law and separate Chanceries, the judges of which were appointed by the Earls until 1536, when, by the Statute 27 Henry VIII c. 24, many of the special privileges were curtailed. The Chancery Court of Lancaster still exists; but the Courts of Pleas at Durham and of Common Pleas at Lancaster were abolished by the Supreme Court of Judicature Act of 1873.

With regard to the removal of the Bishops from the shire court it must suffice here to say that, whereas before the Conquest the local courts had been used for the transaction of lay and ecclesiastical business alike, and in the latter case the Bishop presided; now the general feeling of Western Europe in favour of the separation of the two jurisdictions was shown by William I's Ordinance¹ which bade Bishops and Archdeacons betake themselves to courts of their own where they could administer the Canon Law. The far-reaching consequences of this separation will be dealt with in another place.

The removal of the Ealdorman and Bishop from the shire court left the way free for the advancement of the Sheriff to supreme power in local matters. In his origin the Sheriff had been the representative of royal interests and especially the steward of the royal demesne in each individual shire. His continual presence made him also the judicial president of the

¹ *Sel. Chart.*
p. 85.

(2) Supremacy of Sheriff.

court and the natural administrator of the law. Thus the items for which he was accountable to the king, consisted not only of the rents from the tenants of the demesne, but also of the profits of justice, especially such as arose from the Pleas of the Crown or cases reserved for royal judges, and of all those royal rights, such as the right to treasure trove, which became more comprehensive with the growth of the royal prerogative. In many cases the Sheriff farmed these profits, i.e. paid a lump sum down and recouped himself as best he could from the shire; and the arbitrariness of an authority so exercised caused the wealthier portions of the shire to seek to make terms with him or to escape altogether from his control. The intimate connexion between the Sheriff and the Crown makes the rise of the king's power an index to that of the Sheriff. Thus after the Conquest, though the Sheriff was called *vicecomes* by the Normans, he was in no sense dependent, like the French and Norman Bailiffs, on the Comes or Earl. In fact the office conveyed so much power that, under the two first Norman kings, and again in the early days of Henry II, it was sought by powerful nobles and ecclesiastics, who often paid large sums for the post and occasionally succeeded in making it hereditary. Henry I unsuccessfully attempted to remedy the mistake of his father and his brother by appointing Crown officials who were already Barones Scaccarii; for, as Barons, they audited their own accounts or the accounts of their fellow Sheriffs. On the other hand, Henry II, when he found it necessary after the Inquest of Sheriffs in 1170 to remedy the mistakes of his early days, repeated his grandfather's method of appointment, but took care to keep separate the individuals who filled respectively the offices of Sheriff and of Justice. The appointment to the office of Sheriff was generally for a number of years, though revocable at the royal pleasure: and the *duties* of the office may be described as fourfold. In the first place, now that the ealdorman was gone, the *military* duties fell upon the Sheriff of summoning and superintending the equipment of the lesser tenants-in-chief and of leading the forces of the local fyrd. In *judicial matters*, as the local *Iustitiarius regis* he still presided in the Shire Court. As a *police* officer, he raised the Hue and Cry and supervised the arrangements of the Frankpledge; while to his earlier

financial responsibilities was added the collection of the feudal dues of the lesser tenants-in-chief.

(3) Increased importance of Shire Court.

Decay of Hundred.

¹ Gneist, *Hist. of Eng. Const.* i. 176, 186.

More frequent meetings of Shire Court.

² LI, § 2.

³ *Sel. Chart.* p. 346, § 42.

Establishment of Sheriff's Tourn.

And while the Sheriff climbed into the supreme place in local affairs, the importance of the special sphere of his jurisdiction not unnaturally tended to increase. This came about in three ways. In the first place, the importance of the Hundred as an administrative division was seriously weakened. The private jurisdictions of the English Thegns, followed by the manorial courts of the Normans, must have withdrawn an increasingly large portion of the suitors of the Hundred Court. Nor did the Normans do anything to strengthen it. (1) The Hundred was made responsible for the Murdrum and later for the Presentment of Englishry which grew out of it, and to it was extended a liability for other police penalties for which the townships were primarily answerable. Moreover, its jurisdiction both civil and criminal was enfeebled, if not totally destroyed; for the Sheriff, finding it too great a burden to attend each monthly Hundred Court within the Shire for the hearing of cases which brought in only small fees, transferred many such civil cases to the Shire Court; while the criminal business went to the Sheriff's Tourn. After this, all that remained was the *Curia Parva Hundredi*, a court which met every three weeks for petty civil causes presided over by the Bailiff of the Hundred¹. But owing to the increase of business which resulted from the peace and order brought by the Norman rule, the abeyance of the Hundred Court meant an accession of activity on the part of the Shire Court, which took two forms. (2) The old biennial meetings were obviously insufficient. We find, therefore, in the Laws of Henry I² already quoted, that the Shire Court may if necessary meet oftener than twice a year. This led to the prorogation of the usual meetings, and ultimately to regular monthly sittings for judicial purposes, a practice of which we find a confirmation in Magna Carta³. But with this immensely greater frequency of meetings came a relaxation of attendance, and finally, except on the occasions of the sessions of the royal judges, only the parties interested in the case were summoned. (3) Again, if twelve annual meetings in each Hundred were more than the Sheriff could well manage, he still journeyed twice a year through the separate Hundreds, and in the capacity of royal commissioner disposed

of the small criminal cases which could be most easily dealt with in the places where they were committed. The court which he held on these occasions, the *Sheriff's Tourn and Leet* (Turnus Vice-comitis), though it was often called the Great Court of the Hundred, was a branch of the Shire Court; but being held by virtue of royal commission, unlike the Shire Court it was a royal court of record, i. e. its cases could be quoted as precedents. It seems likely that this court originated in the Assize of Clarendon in 1166. The first clause directs that inquiry shall be made separately by the Judges and the Sheriffs in each County and Hundred through the agency of twelve men of the Hundred and four of the township concerning the commission of misdemeanours. But we know that one of the chief duties of the Tourn came to be the maintenance of the Frankpledge. Now the Frankpledge existed before Henry II; but the procedure of the presentment of criminals for trial by a jury of the neighbourhood was, as we shall presently see, introduced by him, and it has not unnaturally been conjectured that the easiest method was to use the already existing machinery for this latter purpose. Thus 'the duty of producing one's neighbour to answer accusations (the duty of the Frankpledges) could well be converted into the duty of telling tales against him' (Prof. F. W. Maitland¹).

¹ *Introd. to Select Pleas in Manorial Courts*, pp. xxx-xxxvii.

The fourth class of changes wrought by the altered circumstances of the Conquest in the local courts, came from the greater activity of the Crown in matters of local government. The necessity of this arose on the one side from the preference of the English for the old methods of compurgation and ordeal, while on the other side the Normans introduced trial by combat. Thus the English clung to their customary law: the Normans brought their feudal jurisprudence. The only power which could possibly decide or mediate between the two systems was the Crown. This anomalous state of the law and the course of procedure had a threefold result: (1) The Crown had even before the Conquest reserved to itself the trial of certain classes of cases. These had been heard by the Sheriff and had effectually prevented the thegns from gaining exemption from attendance at the Shire as well as the Hundred Court. After the Conquest these *Pleas of the Crown* (Placita Coronae) were enlarged in scope and, though still heard in the local

(4) Increased interference of Crown.

¹ *Pleas of Crown.*

courts, they came not before the Sheriff but before the royal commissioners who grew into Itinerant Justices. (2) But, again, the arbitrary action of the now supreme sheriff and the want of unity in the principles of the law, especially as applied to property, caused the continual failure of justice or inability to get it. Under Henry II the royal court was opened on the payment of fees to the hearing of civil cases, while criminal trials were conducted before the king's Justices in periodical visitations to the shire courts. Nor were these the only modes of interference by the Crown. (3) The police regulations, frankpledge and murdrum, were enforced by fines: the feudal system was based upon the exaction of money fines for neglect or commutation of duties. All such payments in the anomalous state of the law became arbitrary and oppressive, for every royal order could be enforced and every royal privilege protected in this way. Such fines took two shapes—either by a judicial decision a defaulter was adjudged to lie *in misericordiâ regis de pecuniâ suâ*, which despite its harsh wording meant the exaction of a fine from his moveable property; or by a forfeiture his real property or landed estate was taxed with a fixed sum called an *Amerciament*. But the severity of the system brought its own relief. The Charter of Henry I (§ 8) and Magna Carta (§ 20, 21) both contain provisions for the mitigation of such arbitrary exactions: while the practice of the Exchequer reduced the system to a rule by which the amount of the fine had some reference to the culprit's rank, if not to his offence.

(B) Private
jurisdic-
tions.

¹ p. 14.

§ 49. The second class of courts through which the Common Law of the land was administered, were those of the English thegns and of the later lords of manors. We have seen¹ that the widest chasm to be bridged over between the Roman and the feudal manorial systems is presented by the absence in the former of that right of private jurisdiction which forms so essential a feature of the feudal system. Here we are not concerned to build that bridge. All that need be said is that in whatever degree, if at all, the Roman land system may ultimately be proved to have influenced the English settlement, there were two ways in which we can at present account for the growth of a system of private jurisdictions in England. On the creation of estates in bocland it seems to have been the

custom almost from the first to grant away with the land the rights and profits of jurisdiction over its inhabitants. Such privileges came to be called *Sithessocna* or grants of *sac* and *soc*, 'an alliterative jingle' which, whatever its exact meaning at the first, has been discriminated in feudal times as implying, in the word *soc* the right to hold a court for one's tenants, and in *sac* the right to fines and profits arising from such a court¹. We have seen² that there is reason to believe that grants of bocland were not so numerous as is generally supposed. It is possible, then, that landowners in a less assured position obtained the same privileges for themselves. At any rate, the length to which the principle seemed likely to be carried, may be represented by the law which, among other important qualifications, gives only five hides of land (perhaps between 500 and 600 acres) as necessary for the ceorl who would 'thrive to thegn-right³'. However the privilege was gained, it seems to have carried with it exemption from all dues except the *trinoda necessitas* alone. It also involved exemption from the jurisdiction of the neighbouring Hundred Court, though not, except in rare instances, from that of the Shire as well. Often, however, the recipient of *sac* and *soc* would content himself with transacting his business through the usual local courts, provided the profits of justice were secured to him. This anomalous state of things probably would not last for any length of time. The practice of commendation extended the thegn's jurisdiction from those who lived upon his estate to those who had put themselves merely under his personal protection. With the increase of this custom, especially by the commendation of whole townships and districts by one act, the business of the courts would grow so great that for its discharge either new private courts would be set up, or the old local courts in which it was still transacted, would become a monopoly of the landowner. Yet in all cases the machinery of the old local courts would be retained or copied, and the principle that the 'suitors were the judges' survived the Conquest and perhaps affected the development of the manorial jurisdiction.

But if these grants were fewer than is generally supposed, the wonder is that their directly feudal influence was not greater. There are indications that the owners were growing

Grants of
'Sac and
Soc' before
the Con-
quest.

¹ Maitland,
Intro. to
*Select
Pleas*,
p. xxii.
² p. 15.

³ *Sel. Chart.*
p. 65.
*Of People's
Ranks and
Law*, § 2.
Cf. above,
p. 18.

¹ Cf. for references, Stubbs, *Const. Hist.*, § 73, and also Thorpe, *Diplomat. Anglican.*, p. 265.

into a separate caste—for we hear of a mysterious *Thening-manna-gemot*¹, a kind of court of tenants-in-chief, in which the king decided the disputes of the greater thegns. We hear also of the appointment under Cnut from among the great landowners, of a *Landrica* or royal judicial representative over a whole district, who should exercise jurisdiction over the lesser thegns. But neither can be made the basis of a substantial argument; for our knowledge of the gemot is far too shadowy, and the official seems to have been peculiar to Northumbria. Nor do Cnut's much-vaunted four earldoms carry us far in a similar direction. They were probably, as we have had occasion to notice, only the fulfilment of tendencies already at work in the maintenance of provincial life, and the earls were administrators and not necessarily local landowners. Moreover, everything emanated directly from the authority of the king. Not only were certain cases reserved as outside the cognizance of the local courts; but those courts, whether popular or private, derived their title from the Crown, and all came ultimately under the control of the royal officer, the Sheriff.

The Norman Manor.

The Sithessocna of the English thegns were carried on in the seignorial jurisdiction of the Norman barons. We have already dealt at some length with the manor as an agrarian and a social unit, and have seen how little it corresponded in reality with the description of it given by the lawyers. We should expect, however, that, at any rate in its judicial aspect, the lawyers' account was to be trusted. But even here we have to trace an historical growth. The earliest legal account only dates from the latter half of the twelfth century, and the explanations of lawyers of a much later time are open to dispute and often to more than one interpretation. Thus it seems certain that even in the thirteenth century the manor was an economic and agrarian rather than a judicial and administrative unit. 'When men spoke of a manor, they thought primarily of the single group of tenants who worked in common at their ploughings and their reapings, of the single hall or manor house whose needs were supplied, whose garners and larders were filled by the labours of this group².' Thus the manor was not conterminous with the vill or township, nor did it necessarily imply the existence of freehold tenants. At the same time, by the thirteenth century the creation of manors by subinfeudation

² Maitland, *Introduct. to Select Pleas*, p. xl.

had been continuous, and instances are not wanting of the lord of a manor with at least five superior lords. Each of these wielded an extensive jurisdiction over his tenants whether free or otherwise. It seems probable that at the outset this jurisdiction was exercised on two principles which may be described as the Manorial and the Feudal. The lawyers tell us that in England all private jurisdiction after the Conquest was manorial, i. e. that it could only be wielded in connexion with and as the outcome of the possession of a manor. Abroad, however, they allow a feudal jurisdiction also, that is, one exercised over a lord's tenants even though some of those tenants had by subinfeudation from the lord become themselves possessed of manors. There is evidence that this latter kind was to be found in England also, although it was so restricted in its working that the lawyers came to deny the very fact of its existence. Thus the Laws of Henry I¹ inform us that a lord can compel the attendance at his court of a tenant who resides in a remote manor belonging to his Honour. Now, the lawyers state that the aggregate of manors called an Honour, even if contiguous, had no common court. This principle seems directly contradicted by the passage from the Laws which seems to indicate that for the holder of a sub-manor there was some such court to which, moreover, the tenant was bound to come. Again, about a century later, the Petition of the Barons (§ 29) in 1258², gives a threefold gradation of courts—those of the *proximus capitalis dominus feodi*, the *superior capitalis dominus* and the *alter superior*. But the court of the 'superior dominus' at which the 'alter superior' had to attend, could scarcely be the court of the former's particular manor, for the latter was no tenant of that manor, even if he did not, as was often the case, live many miles away from the court at which he had to attend. We may, then, be considered to have sufficient proof that there were to be found even in England a few great lords with jurisdiction exercised by two classes of courts—the court of the manor, to which the inhabitants of that particular manor owed suit; and the court of the Honour, which would be attended by all the more important freeholders, themselves in many cases lords of sub-manors. But it must also be recognized that this was very rare. The reason is to be found in the all-pervading character of the

Manorial
and Feudal
jurisdiction.

¹*Sel. Chart.*
p. 106,
LV. § 1.

²*Ibid.*
p. 386.

royal courts. By means of pleas of the crown, of the monopolization of questions about freehold through the use of writs, of the actions of assize, and more definitely by the legislative limitation both of appeals from a lord to an overlord in the

¹*Sel. Chart.* Provisions of Westminster (§ 16) in 1259¹, confirmed by the Statute of Marlborough in 1267, and of the competence of local courts by the interpretation of the Statute of Gloucester of 1278², the feudal courts were left practically at the mercy of the royal judges. It is, then, true to say that in England there was no classification as in France, of *haute, moyenne* or *basse justice*, and no gradation of courts to stop the application of the remedies of a growing Common Law.

Distinction between Court Leet and Court Baron. Nor, probably, was there at first any classification of rights. An immense variety of franchises or grades of rights and powers were exercised by the private courts; but these were at first the result of gradual accumulation, they were used in the mass, and little thought was given to the titles by which they were acquired or held. Some differences were, however, recognized. There were, on the one side, the rights already described under the name of *sac and soc*, and in Norman Latin as *Halmote* or *Hallmoot*³, i.e. the right to a *libera curia*, not a court of freeholders as usually supposed, but one which is the lord's own; and the right to fines from the jurisdiction of the court. Contrasted with these rights, the necessary accompaniment of a private court, were powers which fell under the head of *Regalia*⁴, being exercised by delegation from the king. Of these the most important was View of Frankpledge. But even this fell into the hands of private lords, until they were brought to an explanation of their claims by the issue of Edward I's Writ *Quo Warranto* early in his reign. The investigations under this writ established the doctrine that the only possible warrant for the exercise of the *Regalia* was an express royal grant; in order to prevent the landowners from being deprived of powers which they had exercised ever since they held their lands, the king conceded in 1290 that continuous possession of a franchise from before the coronation of Richard I should be considered sufficient answer to the inquiry *Quo Warranto*. This distinction was emphasized in the gradual separation of the manorial court into a Court Leet and a Court Baron. The Court Leet was, as the lawyers assert,

³*Sel. Chart.* p. 106, ix. 4.

⁴ Maitland, *Intro. to Select Pleas*, pp. xvii-xx.

a police court exercising royal franchises as a court of record; but it did not exist as a separate court until 'the stringent quo-warranto-ing,' which began in the reign of Edward I, gradually brought out a distinction between the strictly manorial and the royal franchises. The Court Baron was a civil court and not a court of record. The explanation of the lawyers that it was the *Curia baronum* or court of the freeholders has two fatal flaws. In the first place, no such expression is known to occur in a description of the court, and moreover there is no evidence that freeholders as such were ever styled *barones*.

A similar process of gradual separation can be traced in the purely manorial franchises. The Hallmoot or lord's court was attended by freemen and villans alike. The freeholders by themselves would often have been too few to form a court; for, although there are even a few cases of manors without any freeholders at all, there are many in which the number was as small as five. Again, in the rolls of the manorial courts no distinction is made between cases affecting freemen and those in which villans are concerned; while, since even the villans had *judicium parium* or the right of trial by their equals, they would probably ~~have~~ scarcely objected to a jury formed by those who were their social superiors ~~but yet fellow~~ members with themselves of the manorial court. But the introduction of the new procedure with its important accompaniment of a jury of recognition, drew out the distinction between the free and villan tenants. The lord's courts adopted the new procedure eagerly, but with this difference in its application—that, while they could force their villans to take the oath required from Recognitors, the free tenants were in the matter beyond the reach of their influence. Thus for the trial of villans' claims even as against the lord there could be, as in the King's courts, a judge and jury, which could administer the 'custom of the manor'; but the freeholders could appeal to the royal courts, and their claims were protected not only by the judgment of their fellows, but by the law of the land. The result was the gradual separation of the court dealing with the freemen, the Court Baron, whatever the derivation of the term, from the court concerned with the unfree but protected tenants, which, from the jurisprudence it administered, came to be known as the Court Customary.

Distinction
between
Court
Baron
and Court
Custom-
ary.

Summary. We may summarize the history of the manorial courts as follows:—a lord starting with the grants of sac and soc, gradually accumulated and discharged by means of the same court, a variety of powers. But in time there grew up a distinction, on the one side between those powers which he exercised as representative of the king and those which in feudal theory were regarded as inherent in his position of lord of a manor; on the other side, between the mediatorial power which the lord exercised in connexion with his free tenants and the judicial authority wielded over his villans. Thus the one original court fell into three courts, and the lawyers introduced and elaborated all kinds of principles which had no existence in the thirteenth century. The municipal courts will be dealt with more fitly under the head of local government.

§ 50. But these three separate kinds of courts—national, manorial and municipal, represented the application of three several kinds of custom. If this custom was to be harmonized and consolidated into law, it needed the steady, persistent action and the regulative force of one set of universally recognized tribunals. Thus it came about that these various local courts were superseded by the action of courts and judges whose power emanated from the king and that 'the concentration of justice in the king's Court, the evolution of Common Law were but one process' (Prof. F. W. Maitland¹). The reasons for this supersession of the local courts are to be found in the superior and even justice administered by the royal courts. This may be illustrated from a detailed study of the three following most important points—the introduction of a new method of procedure by the use of writs and of trial by jury: the regulative influence of the Itinerant Justices; and the protection afforded by the establishment of the three Courts of Common Law at Westminster.

¹ *Bracton's Note Book*,
Intro.,
p. 5.
Cf. also
Social England,
p. 277.

Judicial
Procedure.

The procedure of the Anglo-Saxon courts as much as that of the present day, started from a distinction between civil and criminal cases. In all early stages of history disputes over civil rights are matters of arrangement. The early English law seems to have contented itself with enforcing the necessity of a certain number of witnesses to every transaction, varying according to the presumed value of the goods exchanged; and as a protection against fraud, the recognition of the application

of the practice of warranty¹. Criminal Law, on the other hand, goes through three stages. The rudimentary right of vengeance which it lay with the family to exact, gave way with the growth of more settled government to the idea of atonement by a money payment to the kindred of the injured person. It is a far greater advance when every offence is regarded as a crime against the whole community, which is only to be expiated by a commensurate punishment. The early English law was on its way to this final stage, but certainly had not reached it, for it divides crimes into those which were bot-worthy or could be repaired by money, and those which were botless or punishable; although even here too, except in the matter of treason, it was in the power of the king to commute the sentence for a money payment. Again, underlying this practice of commutation are the two ideas expressed by the words *bot* and *wite*. 'Bot' was compensation for damage paid either to the individual wronged, in which case, as in the *werigild* or sum paid for a man's life, it bore some proportion either to his station in life or to his injury; or in the case of a dependent, paid to his lord. 'Wite' on the other hand was a commuted punishment paid to the representatives of justice whether king, lord or local court. It was, in short, a fine to buy back peace with the community and to buy off punishment. Starting from this basis we find that the early English used a threefold method for the discovery of guilt. An accusation having been made, recourse was first had to Compurgators or, as they were called in an earlier period, oath-keepers, sometimes relatives but more often mere neighbours of the accused, who would support his oath of innocence. The number seems to have varied according to their rank, though there may have been some general understanding in favour of twelve. It was, like all early justice, a system of probabilities; but a man of notoriously evil character would scarcely have obtained the requisite number of friends who would perjure themselves on his behalf². If the oath of the compurgators in any way failed to satisfy the court, individual witnesses were called who should depose to a particular point agreed upon by the court. They were not, like the jury to be mentioned presently, intended to supply the evidence of the neighbourhood; but rather, like the modern witness, they were in very

¹ Cf. above, p. 50.

Under the Anglo-Saxons.

² Cf. Maitland in *Social England*, p. 286.

rudimentary fashion submitted to a cross examination conducted by an impartial authority. And if the witnesses also failed to satisfy, the last appeal was made to the judgment of God in the *Ordeal*. This was of several kinds, and seems to have been different in the case of a freeman and of a villan. The usual forms required the accused to walk over, or handle bars of red-hot iron, or to plunge the arm into boiling water; when plunged to the elbow it was known as the *triple* ordeal, when to the wrist only, as the *single* ordeal¹. Other modes were the ordeal of water in which a man was thrown bound into the water and considered guilty if he managed to swim; and lastly, the rarely used *corsned* or 'accursed morsel,' in which the accused had to swallow a poisoned piece of bread. Being an appeal to God's judgment the conduct of the ordeal belonged to the clergy, who, if satisfied of the innocence of the accused, would contrive by manipulation that he should escape. Towards the close of Anglo-Saxon times we find something like a jury of presentment in the Twelve Senior Thegns mentioned in Æthelred's law as sworn to accuse no man falsely². In this case the community undertook the prosecution of offenders. But of this more will be said when we come to treat of the jury.

¹ Cf. *Sel. Chart.* p. 71, § 9.

² *Ibid.* p. 72, III. cap. 3.

Changes by the Normans.

³ *Const. Hist.* § 99, but cf. Palgrave, *Eng. Commonwealth*, i. 225.

(1) Introduction of Trial by Battle.

§ 51. A fourth method of appeal to God's judgment common to the Teutonic races, was *trial by battle* (*duellum*), 'the absence of which from the Anglo-Saxon courts,' says Dr. Stubbs, 'is far more curious than its introduction from abroad'. For it seems clear that, from whatever reason, this new mode of ordeal was brought by the Normans to England where it was much disliked. It could be used in civil and criminal cases alike. In the former the plaintiff finds a champion, in theory a witness to the justice of his claim, in practice a professional pugilist, who will sustain his cause. In the latter the accused challenges the accuser to make good his words with his own body. In both cases the combatants fight with weapons of a certain antiquated kind, not to the death, but until the defendant or the accused cries for mercy. When this happens, the defendant pays a heavy fine, but the accused is hanged. If, on the other hand, the day wears away without the plaintiff making good his claim or charge, he is adjudged a perjurer and punished accordingly. But while the English were

tenacious of their ancient methods of trial by compurgation and ordeal, the new trial by battle found no favour in their eyes. Freedom from the 'duellum' was among the privileges sought by chartered boroughs¹; and it was perhaps the aversion of the people to this mode of settling their disputes which led Henry II to extend to all his subjects the 'prerogative' remedy of inquest by a jury of the neighbourhood.

¹ Cf. *Sel. Chart.* pp. 108, 266, 310.

But the Norman kings brought with them the means of ultimately abolishing the old methods of procedure. They had no written laws of their own race. The Normans were not originators, but they were among the most assimilative people whom the civilized world has seen. Thus they brought 'some excellent traditions of a far-off past, of the rule of Charles the Great . . . and these, transplanted into the soil of a subject kingdom, could burst into new life and bear new fruit'.² The first of these means was such an extension of the use of writs that the Normans may be said practically to have introduced them. Before the Conquest, except in cases of appeal and the trial of Pleas of the Crown, the king rarely interfered with the local courts. And even after the Conquest, the Crown, in the desire to preserve the ancient constitution, was content to leave to the local courts the power of first instance or preliminary trial. The original writs, therefore, had no connexion whatever with the relief that was sought; they were merely a general direction emanating from the royal court to do right to the plaintiff. But as the king's authority became recognized, a writ came to be the only appropriate commencement of a civil action at law, and, until late in the reign of Henry II, a particular writ to suit each case was framed in the Chancellor's office and, on demand, was issued therefrom to the Sheriff. When the case was decided, the Sheriff's duty was to return the writ with the judgment endorsed upon it; this was registered by the Chancellor's clerks, and the collection of such writs formed one main foundation of the Common Law in civil cases. These clerks who furnished the appropriate writ to a plaintiff, were called Masters. They were ecclesiastics and doctors of civil law, i.e. the old Roman law. They would consequently resort to the principles of Roman law to fill defects in the English Common Law. But the tendency was towards a definition of the Common Law. Thus while in the

(2) Extension of use of writs.

² Maitland, in *Social England*, p. 275.

earlier thirteenth century the king's power to make new writs was unquestioned, 'as the struggle for Parliament drew near and Henry III forced on the struggle by attempting to govern without a Chancellor and other ministers, the complaints of new and illegal writs grew loud, and the general principle was

¹ *Bracton's* drawn into debate' (Prof. Maitland¹). In the *first* place, the *Note Book*, Provisions of Oxford made the Chancellor swear 'Ke il ne enselera nul bref fors bref de curs sanz le commandement le rei e de sun conseil,' that he would seal no writs excepting

Introd.,
p. 6.

² *Sel. Chart.* of his council². These brefs de curs, brevia de cursu, or 'of course,' were writs framed to meet ordinary cases of continual

p. 389.
³ *Ibid.*
p. 301.

recurrence, and despite Magna Carta³ (§ 40 nulli vendemus . . . justiciam), they could be purchased by an intending plaintiff. It was to these writs that no addition could now be made without consent of the king and council. Now, actions

were divided, in phraseology borrowed from the Roman law, into real and personal. Real actions aimed at the recovery of the possession or property of a freehold. Personal actions were

concerned with damages for injuries to persons or to property, or with breaches of contract. Real actions were commenced by two kinds of writs:—(a) a *Writ of Right* (breve de recto)

for a claim to the fee simple of a landed estate. This was the foundation of the Grand Assize (Magna Assisa), and the action based upon the writ could be tried at choice either before the Curia Regis to which it was taken direct by the writ *Praecipe* ;

or in the local court whence it could be removed on failure of justice to the Curia Regis, until Magna Carta (§ 34) forbade trial in the first instance in the Curia⁴. But the proceedings in

⁴ *Ibid.*
p. 301.

the writ of right were so complex that resource was had rather to (b) a *Writ of Entry*, which referred merely to the possession or seisin of land, and of which the three other Assizes are the most usual particular forms. In course of time and with the

growth of leasehold tenure these real actions were superseded by the action of ejectment, founded on a new writ *ejectio firmæ*, which had in the first instance been devised to give remedy to a lessee against his lord and even against a third person who

had bought the land over his head. Real actions, however, were not legally abolished until 1833 (3 & 4 Will. IV, c. 27, § 36). But, *secondly*, the action of the judges made it

Real actions, however, were not legally abolished until 1833 (3 & 4 Will. IV, c. 27, § 36). But, *secondly*, the action of the judges made it

almost impossible for the Chancellor's clerks to innovate in the forms of writs; for the judges assumed the right of deciding on the validity of the writs on which actions before them must be founded. An attempt to remedy this was made in the Statute of Westminster II, § 24, which allowed the issue of writs '*consimili casu*,' i.e. in like case, falling under 'like law' to one already in existence. But the judges so completely ignored this power of the clerks that 'henceforth the Common Law was dammed and forced to flow in unnatural artificial channels. Thus was closed the cycle of original writs, the catalogue of forms of action to which nought but Statute could make addition' (Prof. Maitland¹).

The writs lead us naturally to the *Jury* through whom the objects of the writs were carried out. The origin of the jury has been a matter of much speculation. Dr. Stubbs enumerates some nine or ten different theories, of which the only common principle seems to be the use of an oath in judicial procedure. Dr. Stubbs himself favours the view that the system was derived directly from the capitularies or charters declaratory of law issued by the kings of the Franks, who in their turn may have adopted it from the code identified with the name of the Emperor Theodosius (A.D. 435-8). The first use of the jury was for cases in which the royal interests were concerned. The *missi* or itinerant officials of the monarchs of the house of Charlemagne were instructed to inquire into fiscal and judicial matters in the district courts by the aid of sworn witnesses representing the evidence of the neighbourhood. The system was continued in France, where, however, it was not developed and was soon forgotten; and in Normandy, where also it retained a comparatively primitive form. In both these countries, though used primarily for royal or ducal purposes, permission was by special favour obtained for its adaptation to the concerns of Churches and even of private persons. But the sworn *recognitors*, as they were called, were witnesses rather than judges in the inquiry which was conducted by the magistrate².

This system of the recognition of rights by a sworn jury of the neighbourhood was introduced into England at the Norman Conquest, and only in England was it much developed. Under the first two Norman kings there

¹ *Bracton's Note Book*,
Introd.
(2) Trial
by Jury.

² *Const. Hist.*
§ 164.
Cf. also
Maitland in
Social England,
p. 288.

are several instances of its use. Thus, in 1070 William I obtained through a sworn body of twelve men in each shire a statement of the English customs¹; and in 1086 Domesday was compiled from information supplied chiefly by the priest, reeve and six villans of each township². These were both for royal business. But instances are not infrequent under all the Norman kings of the use of the same method in the affairs of monasteries³. These were all regarded as acts of the shire court: the method of selecting the jurors is not clearly laid down; but in all probability they were chosen by the sheriff, perhaps by rotation from a list or according to their nearness to the place or their presumed acquaintance with the business to be done. Already under Henry I some of the characteristic difficulties of the system are apparent. There is a body of *judices* and *juratores* which, if merely synonymous terms, are at any rate to be distinguished from the *minuti homines* who were also obliged to attend the local courts. Again, the numerous fines recorded in the earliest extant Pipe Roll (31 Henry I), 'pro defectu recognitionis,' show that there was great reluctance to attend the courts and consequently a scarcity of qualified jurors. It is to Henry II that we must look for the establishment of that inquest by recognition as part of the settled law of the land, which finally resulted in the modern form of trial by jury. Its use was developed in three separate directions. (1) *In financial business*, so long as taxation was based exclusively upon land, the witness of Domesday might be a sufficient guard against undue exactions. But when merchandise, moveables, or personal property were called on to contribute to the exchequer, an owner's liabilities were not so easy to determine. The payer's own return would in the first instance be accepted; but in cases of doubt or dispute recourse was had to the evidence of his neighbours as to his probable expenditure, which could be judged from the standard of life which he maintained. This method was applied on the first occasion indirectly, in order to determine the weapons which under the Assize of Arms (1181) every freeman was to keep at hand⁴. Its first direct use was for the Saladin Tithe, a tenth part of every one's rents and moveables, i. e. income whether derived from land or merchandise, which was voted for the Third Crusade⁵. The success of the system led to its

¹ *Sel. Chart.*
p. 81. R.
Hoveden,
ii. 218.

² *Ibid.*
p. 86.

³ Cf.
Stubbs'
Const.
Hist.
§ 128.

Uses of
Jury.

⁴ *Sel. Chart.*
p. 155.

⁵ *Ibid.*
p. 160.

application in 1198 to determine the liabilities of land¹, and ¹*Sel. Chart.* thus to an assessment which should supersede the now anti- ^{P. 257.} quated record of Domesday. But the use of the jury for this purpose is intimately connected with the history of representation, and the gradual formation of Parliament entirely did away with its functions in this matter.

(2) The use of a jury in judicial business may be dealt with under two separate heads. In the ascertainment of civil rights, or *inquest by recognition*, the jury were known as *Recognitors*, and the business on which they were chiefly occupied was called *Assizes*. These were disputes over the fee simple or the occupation of land, and were commenced by writs from the Chancellor's office, which commanded the sheriff of the shire or the steward of a manorial court that right should be done to the plaintiff on pain of removal of the case into the Curia Regis. There were four such Assizes. (i) *The Grand or Great Assize* (*Magna Assisa*) Glanvill, the justiciar of Henry II, from whom our knowledge is derived, describes as the result of royal clemency to avoid the necessity of trial by battle. The process was that the lawful claimant of a *freehold* whose claim was disputed, obtained a writ to the sheriff bidding the latter nominate four knights of the shire, who in their turn should choose twelve knights of the neighbourhood to determine on oath which of the two litigants had the better claim². (ii) *The* ² *Ibid.* *Assize of Novel Disseisin* (which literally means *new dispossession*) ^{P. 161.} afforded a remedy to a *tenant* who had been turned out of his land or disseised; and (iii) *the Assize of Mort d'Ancestor* took effect when an heir was kept out of his inheritance by the lord of the land. In both these cases, the writ of entry bade the sheriff make a direct nomination of twelve *legales homines* of the neighbourhood, not necessarily knights. The processes were established in 1176 by the ordinance known as the Assize of Northampton, which directed that such cases should be tried before the itinerant justices. Lastly, (iv) *the Assize of Darrein Presentment* (last presentation) was used in the case of advowsons or presentations to Church benefices. If a dispute arose on a vacancy, inquiry was made by a jury as to the last patron who had exercised the right. We have seen that by Magna Carta the Grand Assize was to be tried first in the local courts, but that the complexity of the process caused it to be

superseded by the Assize of Novel Disseisin. As to the last three assizes, Magna Carta (§ 18) directed that they should be taken four times a year before two justices and four knights of the county chosen by the county. In 1217, by the Second Reissue of the Charter, this was reduced to once a year for the two former assizes, while Darrein Presentment was to be kept for the justices in Banco, i.e. at Westminster or with the king.

The application of the jury to criminal cases presents a new set of questions. In this connexion the local assessors were known as the *jury of presentment*, and their duty resolved itself into an indictment before the sheriffs or royal justices of any suspected lawbreaker in the district for which they acted. There are traces of this use of the local courts before the Conquest, and a connexion has been claimed between the jury of presentment and the Compurgators, the Frankpledge and the Twelve Senior Thegns. But (a) the *compurgators* were supplied by the parties to the suit themselves, and were thus in idea partial witnesses; whereas the jury were selected as impartial witnesses by the representative of the central government. Again, (b) the *Frithborh* or Frankpledge, though it was made the vehicle for presentation of criminals, was in its origin a permanent and corporate bail for all members of its body, and was neither selected for an occasion, nor originally forced to present offenders from its own numbers. Moreover, as will be seen, it did not exist before the Conquest. Finally, (c) exact details of the *Twelve Senior Thegns* are so obscure that although there seems reason to believe that they fulfilled the function of a jury of presentment, nothing further can with any certainty be postulated of them. In the Constitutions of Clarendon (§ 6) in 1164¹ such a jury was applied to all cases where the culprit was too mighty for an individual to touch. Two years later (1166), in the Assize of Clarendon (§ 12), which was confirmed and defined by that of Northampton (§ 1) in 1176, all persons of evil fame were to be presented to the justices by twelve lawful men of the hundred and four lawful men of each township².

¹*Sel. Chart.*
p. 139.

² *Ibid.*
pp. 143,
151.
Concentration
of
Jury.

³ *Ibid.*
p. 259.

The various juries were drawn together, and the different branches of their work were placed in the hands of a *Grand Jury* which, by the instructions to the itinerant justices in 1194³, was to be elected by the same double process as the

jury for the Grand Assize, except that the four electing knights were probably themselves elected in the shire court and not nominated by the sheriff. This Grand Jury was to act on all the business of the session, whether it was civil, criminal or even financial.

This method of trial by a fixed number of individuals selected as each occasion arose, quite did away with the old principle that the suitors were the judges. (1) In civil cases, the collection of evidence became a matter of inquiry by royal judges who were trained lawyers, through the testimony of the neighbourhood given for convenience by representatives. The system as left by Henry II only applied to the writ of right and to those particular forms of the writ of entry already noted as the possessory assize (*novel disseisin, mort d'ancestor* and *darrein presentment*). This was for practical purposes almost directly extended in the application of the Grand Jury to all civil cases: consequently, the appointment of a special jury for each case became of less frequent use. The result so far is that, on the one side, the jury were no longer the pronouncers of the custom, for the law which was taking its place was applied by a professional judge: on the other side, the jurors were not entirely witnesses, for the same jury was employed for several cases of different kinds. They were allowed, however, in the absence of special local knowledge among members of their own body, to 'afforce' or add to their number those who had such knowledge. Ultimately, by the fifteenth century the two bodies separated, the afforced jurors remaining as witnesses, and the empannelled jury as such taking up a kind of intermediate position of judges of fact.

Develop-
ment of
Jury.

(2) In *criminal* matters, the Grand Jury received presentments, or information of suspected criminals, from the juries of individual hundreds acting generally through the Sheriff's Tourn, which it confirmed and passed on to final trial in the shire court. This, however, was a waste of time and labour, so that the Grand Jury took on itself the duty of indictment. In this way the local jury of presentment and the Grand Jury became merged. But the Grand Jury, as the jury of presentment before it, had to return answer to certain set questions with which the royal judges were furnished on their circuit; and on the answers so given were framed the official indict-

ments of each individual case as it came up for trial. This method limited the jury to questions of fact, and since it could not be called a '*judicium parium secundum legem terrae*,' the defendant at first was asked whether he would submit himself to this procedure instead of to the old ordeal. To obtain his acquiescence, coercive measures were often employed, the old *peine forte et dure*, until by the Statute of Westminster I, § 12 (1275), the procedure by jury was expressly sanctioned. On the acquiescence of the accused, the case was tried by the king's judges, at first by the same jury which had presented it for trial and which now acted upon facts and not merely upon suspicion; but later by a specially empannelled *Petty* or verdict jury, against the members of which, to the number of thirty-five, objections could be by a statute of Edward III's reign be lodged by the defendant. But there is no trace in the middle ages of the hearing of witnesses before this jury. Its duty was to try on oath the presentments made or confirmed by the Grand Jury, and finally to decide from local knowledge the question of the defendant's guilt or innocence. In order to ensure this, under Edward III six hundredors or inhabitants of the same district of the county, and towards the end of the fifteenth century four hundredors, must by law sit on a verdict jury; and even later still, 'a man who had been summoned as a juror, and who sought to escape on the ground that he already knew something of the facts in question, would be told that he had given a very good reason for his being placed in the jury-box¹.'

¹ Maitland in *Social England*, i. 291.

Survival of old methods of procedure.

Indeed, all the old methods of procedure died hard. The local courts of hundred and shire never assimilated trial by jury and, for this reason among others, decayed with the decay of compurgation and ordeal. But compurgation was not abolished by statute until 1333, and although the Fourth Lateran Council in 1215 practically gave the death-blow to ordeal as a legal process by forbidding the clergy to assist at it, trial by battle only disappeared in 1819, after an attempted revival of the practice in the previous year had shown that it still existed as a possible remedy. Even the '*peine forte et dure*' remained a legal method until 1772. The difficulties and dangers which beset the jury in its development towards its modern form, will be dealt with in speaking of the viola-

tions of the liberty of the subject in comparatively modern times.

§ 52. But neither writs nor jury would have been of much importance or avail without the constant regulative action of the *Itinerant Justices*. The great weakness of the early English constitution was that want of intimate connexion between the central and local government which effectually prevented all concerted action. The greater kings were aware of this fatal defect and took measures to remedy it. Thus Ælfred, perhaps in imitation of the *missi* of the Karoling Empire, investigated cases of injustice through *fideles* or royal messengers: while for the same purpose Eadgar and Cnut held the Witan thrice a year at stated times and places, an example which was imitated by the first two Norman kings. But this was not enough. The establishment of feudalism at the Conquest, with its pecuniary compositions for all liabilities, and the growing needs of a more active government, caused the formulation of an elaborate financial system. After 1086 Domesday became the authority on which all landed property was rated; but changes in the ownership of land, the formation of new forests, and the cultivation of waste land made it necessary constantly to modify the previous assessment of any individual owner. Under William II such questions were referred to the shire court. But the sheriffs in their omnipotence themselves required supervision. For this purpose Henry I sent through the country officials of the newly-formed Exchequer, who should transact local business in each shire, assess the revenue, and hear complaints against the sheriffs. But at first the system was most faulty. The visits of these officials were extremely irregular and were concerned far more with financial than with judicial business: the sheriffs, in the capacity which they often occupied of officials of the Exchequer, themselves went round, audited their own accounts or those of their fellow sheriffs, and no redress could be had. Finally, the private jurisdictions of the great feudal lords were left intact. Nor for the first twelve years (1154-1166) of Henry II's reign is there proof of any change for the better, until the Becket quarrel gave an impetus to popular reforms which communicated itself to this important branch of administration. If the visits of the officials of the Exchequer were not regular, at least

rudimentary fashion submitted to a cross examination conducted by an impartial authority. And if the witnesses also failed to satisfy, the last appeal was made to the judgment of God in the *Ordeal*. This was of several kinds, and seems to have been different in the case of a freeman and of a villan. The usual forms required the accused to walk over, or handle bars of red-hot iron, or to plunge the arm into boiling water; when plunged to the elbow it was known as the *triple* ordeal, when to the wrist only, as the *single* ordeal¹. Other modes were the ordeal of water in which a man was thrown bound into the water and considered guilty if he managed to swim; and lastly, the rarely used *corsned* or 'accursed morsel,' in which the accused had to swallow a poisoned piece of bread. Being an appeal to God's judgment the conduct of the ordeal belonged to the clergy, who, if satisfied of the innocence of the accused, would contrive by manipulation that he should escape. Towards the close of Anglo-Saxon times we find something like a jury of presentment in the Twelve Senior Thegns mentioned in Æthelred's law as sworn to accuse no man falsely². In this case the community undertook the prosecution of offenders. But of this more will be said when we come to treat of the jury.

¹ Cf. *Sel. Chart.* p. 71, § 9.

² *Ibid.* p. 72, III. cap. 3.

Changes by the Normans.

³ *Const. Hist.* § 99, but cf. Palgrave, *Eng. Commonwealth*, i. 225.

(1) Introduction of Trial by Battle.

§ 51. A fourth method of appeal to God's judgment common to the Teutonic races, was *trial by battle* (*duellum*), 'the absence of which from the Anglo-Saxon courts,' says Dr. Stubbs, 'is far more curious than its introduction from abroad.'³ For it seems clear that, from whatever reason, this new mode of ordeal was brought by the Normans to England where it was much disliked. It could be used in civil and criminal cases alike. In the former the plaintiff finds a champion, in theory a witness to the justice of his claim, in practice a professional pugilist, who will sustain his cause. In the latter the accused challenges the accuser to make good his words with his own body. In both cases the combatants fight with weapons of a certain antiquated kind, not to the death, but until the defendant or the accused cries for mercy. When this happens, the defendant pays a heavy fine, but the accused is hanged. If, on the other hand, the day wears away without the plaintiff making good his claim or charge, he is adjudged a perjurer and punished accordingly. But while the English were

tenacious of their ancient methods of trial by compurgation and ordeal, the new trial by battle found no favour in their eyes. Freedom from the 'duellum' was among the privileges sought by chartered boroughs¹; and it was perhaps the aversion of the people to this mode of settling their disputes which led Henry II to extend to all his subjects the 'prerogative' remedy of inquest by a jury of the neighbourhood.

¹ Cf. *Sel. Chart.* pp. 108, 266, 310.

But the Norman kings brought with them the means of ultimately abolishing the old methods of procedure. They had no written laws of their own race. The Normans were not originators, but they were among the most assimilative people whom the civilized world has seen. Thus they brought 'some excellent traditions of a far-off past, of the rule of Charles the Great . . . and these, transplanted into the soil of a subject kingdom, could burst into new life and bear new fruit².' The first of these means was such an extension of the use of writs that the Normans may be said practically to have introduced them. Before the Conquest, except in cases of appeal and the trial of Pleas of the Crown, the king rarely interfered with the local courts. And even after the Conquest, the Crown, in the desire to preserve the ancient constitution, was content to leave to the local courts the power of first instance or preliminary trial. The original writs, therefore, had no connexion whatever with the relief that was sought; they were merely a general direction emanating from the royal court to do right to the plaintiff. But as the king's authority became recognized, a writ came to be the only appropriate commencement of a civil action at law, and, until late in the reign of Henry II, a particular writ to suit each case was framed in the Chancellor's office and, on demand, was issued therefrom to the Sheriff. When the case was decided, the Sheriff's duty was to return the writ with the judgment endorsed upon it; this was registered by the Chancellor's clerks, and the collection of such writs formed one main foundation of the Common Law in civil cases. These clerks who furnished the appropriate writ to a plaintiff, were called Masters. They were ecclesiastics and doctors of civil law, i.e. the old Roman law. They would consequently resort to the principles of Roman law to fill defects in the English Common Law. But the tendency was towards a definition of the Common Law. Thus while in the

(2) Extension of use of writs.

² Maitland, in *Social England*, p. 275.

assize, if laymen, should act as justices of gaol delivery also.

The three
Courts of
Common
Law.

§ 53. But while the king's commissioners were travelling round the country, there were gradually being organized three central courts through whose influence the Common Law was reduced to one uniform system prevailing over all local and class peculiarities, so that it might be in its turn a bulwark against the encroachments of the Crown. We have seen that in 1178 out of the eighteen acting itinerant judges, Henry II selected five to be continually with him. According to *the usual theory*, the members of this court were changed from time to time, but were all chosen from the officials of the Exchequer: the business which came before them was that which at a later date was referred to the three Courts of Common Law, that is, either *placita quae sequuntur regem*, criminal or civil cases which touched the king's rights and revenue, or *communia placita*, cases of private litigation in which the king intervened as supreme arbiter and judge. From this court difficult cases were referred to the king in his council¹, and such cases included questions of revenue as well as legal matters of a more general nature.

¹*Sel. Chart.*
p. 197. *Dia-*
logus i, c. 8,
and

p. 152, § 7.

²Maitland,
Bracton's
Note Book,
Introd.

pp. 4, 18.

But the position of this body of judges was extremely vague, and this theory should probably be largely *qualified*². In the *first* place they were not as yet a separate court. The cases found on the rolls of *Placita quae sequuntur regem* were heard, not by some of the professional judges nor by the king himself, but *coram consilio* or in presence of the prelates and barons; and the court seems a Parliament in the earlier application of the term. The pleas, no matter what their subject, were all entered on the same rolls, so that it is scarcely possible to distinguish between what emerged as three separate jurisdictions, namely (a) the Court of King's Bench, (β) the King in Council, and (γ) the King in Parliament. *Secondly*, by Magna Carta (§ 17), *communia placita*, i.e. common pleas, were fixed at Westminster³. This meant that, while the king kept with him a few professional judges to hear the *placita quae sequuntur regem*, other professional judges sat during term time at Westminster in order to save suitors the trouble and expense of waiting for and following the king in cases in which the Crown had no concern. But these did not form two

³*Sel. Chart.*
p. 299.

distinct colleges of judges, for an individual judge would be attached now to one and now to the other court. Yet the king would no doubt choose as his personal attendants the more experienced judges; and it seems likely that an appointment to hear cases *coram ipso rege* was regarded as promotion in the judicial office. There are, therefore, two great changes to be traced:—(1) a distinction is gradually established between the court which tries the *placita quae sequuntur regem* and that which tries *placita communia*: (2) the jurisdiction of the King's Bench is distinguished from that of the King in Council or in Parliament.

The first of these changes was a gradual process culminating in 1234, when, on the abolition of the justiciarship by the deposition of Stephen Segrave, there begins the first extant roll of pleas which follow the king. Henceforth, not only must each tribunal have had its own record, but the difference between them came to be marked in the following ways—(a) a different process to compel attendance, (b) a distinction in business, which is seen in the refusal of defendants to follow the king for cases of common pleas, (c) the establishment of the right of appeal from the judges who tried common pleas at Westminster to the judges *coram ipso rege*; and (d)—a minor but significant point—the rolls of the common pleas were terminal, while the rolls of those which followed the king were annual, perhaps because cases were heard at the king's court irrespective of the limitations of the legal terms.

The separation of the King's Bench from either of the other more immediate spheres of royal influence may be very briefly treated. It was the result of Edward I's policy of definition. The Council, as has been seen, acquired special qualifications. Parliament became more than a mere law court. But, despite the great inconvenience, the King's Bench continued to follow the king until the reign of Edward III, when it became fixed at Westminster.

Meanwhile, the old Exchequer had been gradually deprived of all its financial functions; for the national finances had grown to something more than could be managed by an organization for the king's private accounts. But the Barons of the Exchequer retained judicial powers of two kinds—(a) equitable jurisdiction which was exercised by the Treasurer

Exchequer
becomes a
Court of
Common
Law.

who, until the creation of a Chief Baron, was the head of the court; and by the Chancellor of the Exchequer, an official created to keep the seal of the Exchequer when the Chancellor began to form a court of his own: (β) cases relating to the revenue or in which members of the court were concerned, and (γ) cases transferred to it as a privilege. The Chancellor of the Exchequer continued to exercise judicial functions until 1735. The equitable jurisdiction of the court was not transferred to Chancery until 1842. Appeals from the common law side of the Exchequer court went (31 Edw. III, c. 12) to the *Court of Exchequer Chamber*, formed of the Chancellor, Treasurer and Justices of the King's Bench and Common Pleas. This lasted until 1873, when it disappeared along with the Exchequer Court itself in the new arrangements of the Courts of Justice.

To return to the separation of the Courts of Common Law. The overshadowing influence of the Justiciar was gone: the great day of the Chancellor was yet to come. Thus, in the abeyance of any overmastering legal authority, each of the courts, by the reign of Edward II, had obtained its own staff of judges. If any one succeeded to the Justiciar's title it was the Chief Justice of the King's Bench; but, except in dignity, he had no advantage over the Chief Justice of the Common Pleas or the Chief Baron of the Exchequer. Finally, the ensuing fees and fines induced the courts themselves to make great encroachments on each other's jurisdiction; for the *Articuli super Cartas* in 1300 forbade Common Pleas to be heard in the Exchequer. These mutual attempts at injury, however, gave place before long to the common feeling of antagonism entertained by all three courts of Common Law, for the jurisdiction of Chancery on the one side, and, on the other, for that of the ecclesiastical courts.

Forest
Courts.

§ 54. Before passing on to the results of the concentration of justice in the royal courts, it is necessary to deal shortly with a class of prerogative courts through whose agency the royal power must have been widely spread. The *Forest Courts* were a creation of the Conquest. A forest was not necessarily a waste place, nor did it always belong to the king: on the contrary, it was generally private property and was often thickly populated. The basis of the royal claim upon

the forests is difficult to determine, especially as none was recognized either by the law or by the owners of property. The struggle between king and nation over the extension of the area of the forests lasted for more than two centuries (1066-1300). The general course of it was as follows. William I afforested or made the New Forest. Henry I, by consent of his barons, kept the forests which his father had made¹, and Stephen surrendered Henry I's additions². John, by Magna Carta (§ 4), surrendered all that he himself had added³; while Henry III surrendered all additions made since the accession of Richard I, and submitted to a perambulation to determine the boundaries⁴. The limitation of the forests was the last point upon which Edward I gave way; but by the Articuli super Cartas in 1300 he was obliged to submit to a restraint similar to that which had been placed upon his father⁵.

For all dwellers within this expansive forest area there was a special law and a special set of courts. The earliest forest law is one attributed to Cnut, which is merely a confirmation of the rights of landowners in the matter. The first code of forest laws is the Assize of Woodstock drawn up under Henry II, and recording the severities of his grandfather⁶. By it, the forest jurisdiction was extended (§ 9, over the clergy by connivance of the papal legate, and (§ 11) over the whole population of the shires at the summons of the Master Forester. Richard I went even further; for he added that the whole population should come as a matter of course before the itinerant justices of the forest⁷. This, however, was withdrawn by Magna Carta (§ 44), which also provided (§ 48) for the abolition through inquest by jury of all evil customs of the forest⁸. The result of this provision was that Henry III's ministers issued a separate Charter of the Forest in which the punishments decreed against offenders were much milder than those of Henry II's Assize. Thus, while in the Assize (§ 12) for a third offence an offender forfeited freedom or life, by the Charter (§ 10) no one should lose life or limb. Again, whereas the Assize (§§ 3, 7) restricted the rights of private owners within their own forests, the Charter (§§ 9, 12, 13) brought to these same owners a confirmation of their rights⁹.

This law was applied by a set of courts which were parallel to those of the hundred and shire. The lowest of these was

¹ *Sel. Chart.*

p. 101, § 10.

² *Ibid.*

p. 120.

³ *Ibid.*

p. 297.

⁴ *Ibid.*

p. 348, § 1.

⁵ *Ibid.*

p. 348, § 1.

⁶ *Ibid.*

p. 446,

*Statutes of**Realm,*

i. 136.

⁷ *Ibid.*

p. 258;

R. Hove-

den, iv. 63.

⁸ *Ibid.*

p. 302.

⁹ *Ibid.*

pp. 348-351.

(1) the Court of *Attachement* or *Woodmote*, held every forty days by the *Verderers* to receive the presentment of suspected offenders who had been attached or arrested by the *Foresters* or *Constables*. (2) The Court of *Swainmote* was held thrice a year under the presidency of the *Verderers*. Here attended all the officers of the forest together with the reeve and four men from each township within the forest, to receive indictments and to form juries of inquest. The *Swainmote* convicted or acquitted on local knowledge, but judgment was reserved for (3) the Court of *Justice Seat*, a supreme court of civil and criminal jurisdiction, held every three years or when the king issued a commission for the purpose. This court determined all suits whether arising from claims of civil rights or the presentment of criminals, and in preparation for it there was held a *Regard* or visitation of the forests by *Regarders* or *Inspectors*.

Thus the *officials* of the forests formed a regular hierarchy. At the head came a *Master Forester*, independent even of the *Justiciar* himself. The *Justices in eyre* or circuit of the forests tried the presentments of the *Verderers*, of whom four were chosen, like the coroners, in each county court.

By this means a large portion of the country must have been withdrawn alike from the action of the Common Law and from the influence of private lords. The best parallel is to be found in the prerogative courts of Tudor and Stuart times, which are said to have dominated an entire third of the whole country.

Results of
concentration
of
justice in
King's
Courts.

§ 55. So far we have been dealing with the reasons which led to the gradual concentration of justice in the royal courts. It is necessary now to consider the results of this most important change. They may be grouped under the three following heads—(1) the decay of the local courts; (2) the change of the Common Law to a written law; and (3) the rise of the jurisdiction of Chancery.

It is usually asserted that the *Conquest made no difference in the constituent elements of the local courts*, and an appeal is made in proof to the laws of Henry I. But a passage in those laws (§ vii. 7) tells us that if any of the *barones* of the king or of others (whatever that may exactly mean), or their stewards, are present at the shire court, they shall acquit the whole

demesne. But if neither the lord nor his steward can be present, the reeve, priest and four of the better men of the township shall go to represent those who have not personally been summoned¹. The two seem alternatives. Again, we have already noticed the distinction, which also appears under Henry I, between the *judices* and jurors and the *minuti homines*. The same laws (§ xxix) tell us that the king's *judices* are the *barones* of the county, whereas the *villani* and others of less rank were not to be reckoned among the number². Moreover, the jury are always described as consisting of the *legales homines* or 'traditional lawmen,' as the words have been translated. The cartularies of manors in the thirteenth century and the Hundred Rolls of 1279, drawn up for purposes of taxation, point in the same way to a select body as members of the local courts. On nearly every manor there are found holdings whose tenants discharge their duty, or in the phrase 'defend' their lands, by doing at the local courts the suit that is due from the whole estate. Proofs of this are both positive and negative. The free tenant, who may be even a small socager holding a single virgate, or the only free tenant enfeoffed for the purpose on the manor, discharges sometimes the whole, but often a part of the suit due to the hundred and the shire. On the other side, there are cases of indignant remonstrance at any attempted multiplication by subinfeudation of the usual number of suits. It is hard to avoid the belief that the 'plenus comitatus' did not consist by any means of all the freeholders in the shire, but rather 'of those persons who by means of proprietary arrangements between lords and tenants had become bound to do that fixed quantum of suit to which the county court was entitled.' The origin of this has been conjecturally traced to the revival of the local courts by Henry I when the 'duty was conceived as being incumbent . . . on all freeholders who or whose overlords had no chartered or prescriptive immunity; but that it was also conceived as being, like the taxes of the times, a burden on the land held by those freeholders, so that when the land held by one of them was split up . . . the number of suits due was not increased³.' But even the small number of which the local courts must, on this hypothesis, have consisted, was reduced further by the legislation of the

Suitors of
the local
courts.

¹*Sel. Chart.*
p. 105.

²*Ibid.*
p. 106.

³Maitland
in *English
Hist. Rev.*
iii. 420-1.

thirteenth century. The Statute of Merton in 1236 allowed every baron to appear by proxy; and the Statute of Marlborough in 1267 exempted from the Sheriff's Tourn all above the degree of knight unless they were specially summoned; while the grant of the privilege of their own view of Frankpledge removed the boroughs from the same assembly. The exact relation of this legislation to the theory of attendance just stated, is difficult to determine, especially as there seems reason to believe that the same limited body came even to meet the royal justices on circuit. This, however, is at present an open question. But whatever may have been the qualifications of the 'legales homines,' it was perhaps the burden of the work and the danger of corruption that caused a limitation of the jurors for assizes by the Statute of Westminster II, c. 38, to freeholders of twenty shillings annual value, an amount which in the reign of Henry V was raised to forty shillings. (2 Hen. V, c. 3.)

Decline of
the Sheriff's
authority.

Together with this denudation of the local courts went a diminution of the power of the Sheriff. This may be dated from Henry II's great Inquest of Sheriffs in 1170, and may be traced in the four departments of the sheriff's work. Thus, (1) his *military* authority was lessened when scutage practically did away with the levy of the minor tenants-in-chief; while the Assize of Arms in 1181 placed in the hands of the justices the duty of superintending the armaments of the local fyrd¹. Under Henry III (1252), chief constables were appointed for every hundred, and a petty constable for each township², who generally combined the duties with that of bailiff or reeve. Finally, by the Statute of Winchester (1285), view of armour was to be held by two constables in every hundred and private jurisdiction, and defaulters presented to the sheriff³. Yet the sheriff's power was not altogether destroyed. Until the appointment of a Lord Lieutenant under the Tudors, he remained the local leader of the shire forces. Those of the lesser barons, too, who did not pay scutage, were mustered under him; and even the greater barons occasionally were entrusted to him rather than to the Constable and the Marshal who usually convened them. A remnant of the sheriff's military authority appears in his later duty of 'pricking' for Commissions of Array. As (2) a judicial officer, the sheriff was gradually

¹ *Sel. Chart.* the duty of superintending the armaments of the local fyrd¹. p. 155, § 9.

² *Ibid.* Under Henry III (1252), chief constables were appointed for every hundred, and a petty constable for each township², who generally combined the duties with that of bailiff or reeve. p. 372.

³ *Ibid.* Finally, by the Statute of Winchester (1285), view of armour was to be held by two constables in every hundred and private jurisdiction, and defaulters presented to the sheriff³. Yet the sheriff's power was not altogether destroyed. p. 471, § vi.

deprived of all his more important work. In the first place, (a) special officials were appointed, to whom were allotted duties which would naturally have fallen to the sheriff. Such were the *Coroners*, who, by the judicial instructions of 1194, were to be elected by the people to keep the Pleas of the Crown and generally to look after royal interests¹. Under Edward I they were specially charged with the holding of inquests in cases of unusual death; but for some reason they were probably found inadequate, for their duties did not develop. Such, again, were *Justices of Trail Baston* instituted under Edward I and occasionally appointed in later times, who were a kind of Court Martial for disorderly periods and districts; but on account of their summary methods of procedure they met with much opposition. A third kind of such officials were the *Conservatores Pacis*, of whom as Justices of the Peace much will need to be said in another connexion. But (b) the sheriff was actually and by direct legislation deprived of portions of his power. Thus, by the Judicial Iter of 1194 (§ 21) it was laid down that no sheriff should be justice in his own county²; while Magna Carta (§ 24) forbade the sheriff to hold Pleas of the Crown³. Again, (c) the sheriff was made amenable to the Itinerant Justices. For, while the Assize of Clarendon equally charged the sheriff and the justices with the work of receiving presentments from hundred and township⁴, by the Assize of Northampton this duty was committed to the justices alone⁵. Similarly, at first the sheriff had a hand in the appointment of Juries of Assize; but by the Iter of 1194 the Grand Jury was to be chosen by the shire court⁶. Yet the sheriff retained some traces of his former position. Thus, the tourn was still for a long time held to receive presentments and to conduct preliminary examinations of persons charged with crimes. Having ceased to be judges, the sheriffs remained presidents of a number of small local courts which could accuse, although they could not try. This power, however, was used for purposes of extortion, and by a law of Edward IV (1 Edw. IV. c. 2) they were deprived of it. There remained to them merely the duties of arresting suspects and of exacting penalties adjudged by the courts. As a police officer, the sheriff's power received an irreparable blow from the lapse of the view of frankpledge,

¹ *Sel. Chart.*
p. 260, § 20.

² *Ibid.*

p. 260, § 21.

³ *Ibid.*

p. 300.

⁴ *Ibid.*

p. 143, § 1.

⁵ *Ibid.*

p. 151-2.

⁶ *Ibid.*

p. 259.

which robbed his tourn of its most characteristic duty; and from the appointment of constables in the hundreds and townships. He was, however, the person to whom royal writs, such as those for distraint of knighthood, continued to be addressed, and to him were prisoners entrusted until the coming of the Itinerant Justices. Lastly, his *financial* duties also threatened to disappear; for first the assessment of taxes, and then their collection, were made over to special commissioners, while the charters of boroughs removed them in many points from the sheriff's control. But the sheriff could not altogether be dispensed with. He still raised the ferm of the shire and collected the tallage of unchartered towns: he was concerned with purveyance, and for some time helped the special commissioners in the collection of the taxes. Thus though deposed from the supreme place which he had occupied before 1170, the sheriff still retained numerous shreds of his ancient powers. Indeed, his continued importance is attested by the struggle over his appointment in the contests of the thirteenth century, and by the influence which he exercised in the two following centuries over the election of members to Parliament.

Decline of
com-
petence of
the local
courts.

While the courts were thus dwindling in the number of their suitors till they tended to disappear altogether, and while the sheriff was being docked of one piece of authority after another, the actual competence of the courts themselves, whether national or feudal, to deal with all important matters was gradually reduced. The extension of Pleas of the Crown and their transference from the sheriffs and then the coroners to the Itinerant Justices, was only the natural corollary to the organization of the judicial body. But the employment of writs, followed by the remedy of the Assize, gradually made the king's court a court of first instance for all England, and practically withdrew from the private courts all valuable jurisdiction over freeholders. The courts, however, still lasted on, acting as delegates of the Crown who could at pleasure evoke all suits to the royal tribunals; until the Statute of Gloucester in 1278 (6 Edw. I, c. 8) was interpreted to mean that no action for more than forty shillings could be tried in a local court. This told alike on the national and feudal courts; and, while the part taken by the shire courts in the election of parliamentary representatives gave them a new lease of life, the feudal courts

entirely disappeared, leaving only the manorial court with jurisdiction over villans.

The second great result of the supremacy of the royal courts was a strong impetus towards the fixing of the form of the Common Law. Up to the time of Edward I the Common Law was definitely an unwritten law, and, although it never entirely ceased to be so, yet it was tending to take a settled form. The causes of this important change were—(a) the establishment of Parliament as the one proper organ of legislation which prevented the unauthorized development of procedure by the issue of new writs; (b) the establishment of a series of precedents by judicial decisions which were considered to have an authority binding on succeeding judges almost equally with acts of the legislature. To these may be added (c) the growth of a class of professional lawyers, as is proved by the publication of such authoritative law-books as those associated with the names of Glanvill, Bracton, Fleta and Britton; and (d) the formulation of the courts of which mention has just been made.

Fixing of
the Com-
mon Law.

The Common Law of England may thus be said to consist of three elements:—(1) *Lex non scripta* or *customary law*. Such customs date from remote antiquity 'whereof the memory of man runneth not to the contrary,' and, in order to obtain recognition, they must have existed continuously. A second element is formed by the (2) *Lex scripta* or *statute law*, in which the duty of interpretation devolves on the judges who are guided by various recognized rules or canons of construction. To these may be added (3) *maxims drawn from approved legal authorities*. Up to the reign of Richard II the judges, in deciding a case upon principle for which no direct authority could be cited from the reports of adjudicated cases, would listen to arguments drawn from Roman Law. This put into the hands of the common-law judges a power of innovation and expansion. But in that reign they refused to allow such pleadings for the future; and with the banishment of Roman Law from the courts this power ceased, until competition with Chancery caused the common lawyers once more to adopt those principles by whose application Chancery had obtained such vogue.

§ 56. In sharp contrast to the methods and sources of the Chancery.

Common Law stands the legal system of the CHANCERY, which owes its power to the deliberate refusal of the common lawyers to meet the growing wants of succeeding times by measures for the continuous development of their procedure.

Early
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The Chancellor first appears in England under Edward the Confessor. He was the chief secretary, head of the king's chaplains and keeper of the royal seal. The name was derived from the *cancelli* or screen behind which he worked. Owing to the literary qualifications of the office, it was in early days always in the hands of an ecclesiastic. It was not until the abolition of the Justiciarship that the Chancellor became the great political official which he remained until the days of the Tudor sovereigns. But, meanwhile, his legal position was considerable; for he was the head of the office from which were issued the writs through whose operation the royal justice overrode the private jurisdictions. From the time of Edward I the advance of the Chancellor's power was continuous until (a) under Edward III the Chancery was established as a separate court; (β) under Edward IV it became a separate jurisdiction; (γ) under James I it established its right to hear appeals from the common-law courts, and (δ) in the tenure of office by Lord Eldon the Chancellor's 'discretion' became practically and legally fixed (1801-1827).

Chancery
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The establishment of Chancery is generally ascribed to an ordinance of Edward I in 1290 by which petitions were delegated to be dealt with by the courts which they concerned. Among these mention is made of the Chancellor. But this was probably no novelty. The Chancellor at first exercised his jurisdiction in the king's Council, of which he was the president; but he had as yet no monopoly in the application of the royal prerogative of grace, much of which was carried out by the king in person¹. Under Edward II the Chancellor seems to have begun to sit regularly for judicial business. A large and important part of this was concerned with petitions whose claims affected the royal rights, and became the chief portion of the Chancellor's common-law jurisdiction. Under Edward III the Chancery became fully established as a separate court whose seat was at Westminster. In 1350 all such matters as were of grace, that is, involving the exercise of the king's prerogative of grace, were referred to the Chancellor.

¹ Kerly,
*Hist. of
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Thus the Chancery, as a formulated court, exercised two kinds of powers—(i) as a court of ordinary jurisdiction; for the king could at his pleasure sue either there or in the common-law Courts in any case to which he was a party: (ii) as a distinct court for giving relief in cases which required extraordinary remedies. But two important provisos must be made. In the first place, although petitions now began to be addressed to the Chancellor direct, yet matters of grace did not come exclusively to him. A close connexion continued between him and the Council of which he seemed to be the official representative and acting committee in these matters. Secondly, although Chancery had a procedure of its own, yet it often adopted common-law procedure in matters outside its ordinary jurisdiction, and the special procedure in cases falling within it; while, since the Chancellor never had authority to summon a jury, matters of disputed fact were transferred to be tried in the King's Bench.

Thus although the Chancery was a distinct court, the jurisdiction of the Chancellor was not as yet a thing enjoyed by himself in his court alone. But the practical settlement of the Common Law, for reasons already stated, caused continual failure of redress, especially when the plaintiff was poor and unable to pay the fees for obtaining the original writs. Thus the encouragement came from two sides. On the one hand, *individuals* applied for help to the Chancellor because the special procedure of his court enabled him to give remedies for wrongs which the Common Law did not recognize. This procedure consisted of (i) a power, borrowed from the Council, of compelling the attendance of a defendant under penalty by what was hence called the Writ of Subpoena, and (ii) the power, borrowed from the Canon Law, of examining the defendant upon oath. But, on the other hand, the *Commons* who had begun by complaining strongly of the Chancellor's growing jurisdiction, finding that it could not be extinguished, tried to regulate it. Not only was it recognized by a Statute of Richard II's reign (17 Ric. II, c. 6) as a distinct and permanent court, but Parliament even delegated matters to the Chancellor as the person who should redress wrongs for which the Common Law gave no remedy. Two important results followed from this double encouragement. By the enforce-

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ment of Uses of which the common-law courts refused to take cognizance, a vast mass of business was attracted to the court, and there was formed and administered in Chancery a distinct code of laws by which the enjoyment and alienation of property was regulated on principles very different from those of the Common Law. Moreover, instead of remaining a kind of acting committee of the Council, by the reign of Edward IV the Chancellor himself conducted the business of his court and formulated its decrees.

Chancery
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But with the establishment of the Chancellor's separate jurisdiction, the Courts of Common Law took the place of Parliament as plaintiffs against the action of Chancery. And this on two grounds. (1) In the first place, the common lawyers joined issue with Chancery on the *kind of law* which was administered by that court. Now, although high legal opinion can be quoted in support of the view that the Chancellor was guided merely by personal discretion in his judgments; yet beneath such discretion are to be found two leading principles which, in some degree or other, he made the source of his decisions. The first of these was (*a*) *the Roman Law*, which included the dictates both of *equity* as set forth in the Civil Law, especially since the refusal of the common lawyers to allow its efficacy in their courts, and those also of *conscience*, which had been a monopoly of the Canon Law until the lay lawyers succeeded in removing from the ecclesiastical courts the cognizance of all such cases where laymen were concerned. Henceforth it was only possible for such cases to be heard by Council or by Chancery. To this should be added (*b*) *Precedents*, especially after the commencement of the publication of year books or reports of adjudicated cases. Of these the first instance in Common Law is in the reign of Edward I; while the earliest Chancery reports date from Henry V. But it is to the Tudor times and to the development and concentration of the legal functions of the Chancellor that we have to look for the full growth of this force. The changes made in the law of property by the Statutes of Uses (1535-6) and Wills (1540), and the changes made in its possession by the dissolution of the monasteries, rendered necessary the appointment of a regularly trained lawyer to the Chancery. Thus Wolsey's successor was Sir Thomas More. But owing to the ignorance of the Civil Law

displayed by these non-ecclesiastical Chancellors, precedents assumed such an increasing importance that, under Elizabeth, they began to be authoritatively published, and the extent of their influence may be measured by the fact that, under Charles I, the Chancellor refused to interfere in a case because there was no precedent to guide him.

(2) A much more serious cause of complaint against Chancery was its desire to *supervise the judgments of the Courts of Common Law*. This it attempted to do by the issue of *injunctions* prohibiting plaintiffs from proceeding with actions at common law, or of *executions* on judgments obtained at common law in cases where the legal claims seemed to be against equity or conscience. So long as the Chancellor was a great political official, the protests of the common lawyers were ineffectual; but under the Tudors, while the position of the Chancellor was reduced, the Common Law was strengthened by the introduction of new remedies in competition with Chancery, and by the abolition (through the Statute of Uses) of much of the Chancellor's early jurisdiction. In James I's reign, therefore, the common lawyers determined to bring matters to an issue. In the case of two notorious swindlers, named *Glanville* and *Allen* who, having been acquitted by the common-law courts, had been punished in Chancery, Chief Justice Coke persuaded the culprits to indict their prosecutors and those prosecutors' counsel for 'praemunire' because they had called in question a judgment of the King's Court. But the Attorney General, Bacon, and other lawyers to whom, on the appeal of the Chancellor, the king had referred the matter, decided in favour of the Chancellor's power. Henceforth, down to the Judicature Act of 1873, recognition was given to the right of the Chancellor to grant injunctions against suits at law and against the enforcements of judgments obtained in the common-law courts.

But the position of Chancery itself from this time underwent a considerable change. Hitherto there had been no regular *appeal against the decisions of the Chancellor*. The only course open to suitors was a petition to Parliament or the Crown, until the case of *Shirley v. Fagg* established the right of such appeal to the *House of Lords* (1675). At the same time, the friends of the Common Law did everything in their power so

Changes in
Chancery.

(1) the Court of *Attachment* or *Woodmote*, held every forty days by the *Verderers* to receive the presentment of suspected offenders who had been attached or arrested by the *Foresters* or *Constables*. (2) The Court of *Swainmote* was held thrice a year under the presidency of the *Verderers*. Here attended all the officers of the forest together with the reeve and four men from each township within the forest, to receive indictments and to form juries of inquest. The *Swainmote* convicted or acquitted on local knowledge, but judgment was reserved for (3) the Court of *Justice Seat*, a supreme court of civil and criminal jurisdiction, held every three years or when the king issued a commission for the purpose. This court determined all suits whether arising from claims of civil rights or the presentment of criminals, and in preparation for it there was held a *Regard* or visitation of the forests by *Regarders* or *Inspectors*.

Thus the *officials* of the forests formed a regular hierarchy. At the head came a *Master Forester*, independent even of the Justiciar himself. The *Justices in eyre* or circuit of the forests tried the presentments of the *Verderers*, of whom four were chosen, like the coroners, in each county court.

By this means a large portion of the country must have been withdrawn alike from the action of the Common Law and from the influence of private lords. The best parallel is to be found in the prerogative courts of Tudor and Stuart times, which are said to have dominated an entire third of the whole country.

Results of
concentra-
tion of
justice in
King's
Courts.

§ 55. So far we have been dealing with the reasons which led to the gradual concentration of justice in the royal courts. It is necessary now to consider the results of this most important change. They may be grouped under the three following heads—(1) the decay of the local courts; (2) the change of the Common Law to a written law; and (3) the rise of the jurisdiction of Chancery.

It is usually asserted that the *Conquest made no difference in the constituent elements of the local courts*, and an appeal is made in proof to the laws of Henry I. But a passage in those laws (§ vii. 7) tells us that if any of the *barones* of the king or of others (whatever that may exactly mean), or their stewards, are present at the shire court, they shall acquit the whole

demesne. But if neither the lord nor his steward can be present, the reeve, priest and four of the better men of the township shall go to represent those who have not personally been summoned¹. The two seem alternatives. Again, we have already noticed the distinction, which also appears under Henry I, between the *judices* and jurors and the *minuti homines*. The same laws (§ xxix) tell us that the king's *judices* are the *barones* of the county, whereas the *villani* and others of less rank were not to be reckoned among the number². Moreover, the jury are always described as consisting of the *legales homines* or 'traditional lawmen,' as the words have been translated. The cartularies of manors in the thirteenth century and the Hundred Rolls of 1279, drawn up for purposes of taxation, point in the same way to a select body as members of the local courts. On nearly every manor there are found holdings whose tenants discharge their duty, or in the phrase 'defend' their lands, by doing at the local courts the suit that is due from the whole estate. Proofs of this are both positive and negative. The free tenant, who may be even a small socager holding a single virgate, or the only free tenant enfeoffed for the purpose on the manor, discharges sometimes the whole, but often a part of the suit due to the hundred and the shire. On the other side, there are cases of indignant remonstrance at any attempted multiplication by subinfeudation of the usual number of suits. It is hard to avoid the belief that the 'plenus comitatus' did not consist by any means of all the freeholders in the shire, but rather 'of those persons who by means of proprietary arrangements between lords and tenants had become bound to do that fixed quantum of suit to which the county court was entitled.' The origin of this has been conjecturally traced to the revival of the local courts by Henry I when the 'duty was conceived as being incumbent . . . on all freeholders who or whose overlords had no chartered or prescriptive immunity; but that it was also conceived as being, like the taxes of the times, a burden on the land held by those freeholders, so that when the land held by one of them was split up . . . the number of suits due was not increased³.' But even the small number of which the local courts must, on this hypothesis, have consisted, was reduced further by the legislation of the

Suitors of
the local
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¹*Sel. Chart.*
p. 105.

²*Ibid.*
p. 106.

³ Maitland
in *English*
Hist. Rev.
iii. 420-1.

thirteenth century. The Statute of Merton in 1236 allowed every baron to appear by proxy; and the Statute of Marlborough in 1267 exempted from the Sheriff's Tourn all above the degree of knight unless they were specially summoned; while the grant of the privilege of their own view of Frankpledge removed the boroughs from the same assembly. The exact relation of this legislation to the theory of attendance just stated, is difficult to determine, especially as there seems reason to believe that the same limited body came even to meet the royal justices on circuit. This, however, is at present an open question. But whatever may have been the qualifications of the 'legales homines,' it was perhaps the burden of the work and the danger of corruption that caused a limitation of the jurors for assizes by the Statute of Westminster II, c. 38, to freeholders of twenty shillings annual value, an amount which in the reign of Henry V was raised to forty shillings. (2 Hen. V, c. 3.)

Decline of
the Sheriff's
authority.

Together with this denudation of the local courts went a diminution of the power of the Sheriff. This may be dated from Henry II's great Inquest of Sheriffs in 1170, and may be traced in the four departments of the sheriff's work. Thus, (1) his *military* authority was lessened when scutage practically did away with the levy of the minor tenants-in-chief; while the Assize of Arms in 1181 placed in the hands of the justices the duty of superintending the armaments of the local fyrd¹. Under Henry III (1252), chief constables were appointed for every hundred, and a petty constable for each township², who generally combined the duties with that of bailiff or reeve. Finally, by the Statute of Winchester (1285), view of armour was to be held by two constables in every hundred and private jurisdiction, and defaulters presented to the sheriff³. Yet the sheriff's power was not altogether destroyed. Until the appointment of a Lord Lieutenant under the Tudors, he remained the local leader of the shire forces. Those of the lesser barons, too, who did not pay scutage, were mustered under him; and even the greater barons occasionally were entrusted to him rather than to the Constable and the Marshal who usually convened them. A remnant of the sheriff's military authority appears in his later duty of 'pricking' for Commissions of Array. As (2) a judicial officer, the sheriff was gradually

¹ *Sel. Chart.*
p. 155, § 9.

² *Ibid.*
p. 372.

³ *Ibid.*
p. 471, § vi.

deprived of all his more important work. In the first place, (a) special officials were appointed, to whom were allotted duties which would naturally have fallen to the sheriff. Such were the *Coroners*, who, by the judicial instructions of 1194, were to be elected by the people to keep the Pleas of the Crown and generally to look after royal interests¹. Under¹ *Sel. Chart.* Edward I they were specially charged with the holding of inquests in cases of unusual death; but for some reason they were probably found inadequate, for their duties did not develop. Such, again, were *Justices of Trail Baston* instituted under Edward I and occasionally appointed in later times, who were a kind of Court Martial for disorderly periods and districts; but on account of their summary methods of procedure they met with much opposition. A third kind of such officials were the *Conservatores Pacis*, of whom as Justices of the Peace much will need to be said in another connexion. But (b) the sheriff was actually and by direct legislation deprived of portions of his power. Thus, by the Judicial Iter of 1194 (§ 21) it was laid down that no sheriff should be justice in his own county²; while Magna Carta (§ 24) forbade the sheriff to hold Pleas of the Crown³. Again, (c) the sheriff was made amenable to the Itinerant Justices. For, while the Assize of Clarendon equally charged the sheriff and the justices with the work of receiving presentments from hundred and township⁴, by the Assize of Northampton this duty was committed to the justices alone⁵. Similarly, at first the sheriff had a hand in the appointment of Juries of Assize; but by the Iter of 1194 the Grand Jury was to be chosen by the shire court⁶. Yet the sheriff retained some traces of his former position. Thus, the tourn was still for a long time held to receive presentments and to conduct preliminary examinations of persons charged with crimes. Having ceased to be judges, the sheriffs remained presidents of a number of small local courts which could accuse, although they could not try. This power, however, was used for purposes of extortion, and by a law of Edward IV (1 Edw. IV. c. 2) they were deprived of it. There remained to them merely the duties of arresting suspects and of exacting penalties adjudged by the courts. As a police officer, the sheriff's power received an irreparable blow from the lapse of the view of frankpledge,

¹ *Sel. Chart.*
p. 260, § 20.

² *Ibid.*

p. 260, § 21.

³ *Ibid.*

p. 300.

⁴ *Ibid.*

p. 143, § 1.

⁵ *Ibid.*

p. 151-2.

⁶ *Ibid.*

p. 259.

which robbed his tourn of its most characteristic duty; and from the appointment of constables in the hundreds and townships. He was, however, the person to whom royal writs, such as those for distraint of knighthood, continued to be addressed, and to him were prisoners entrusted until the coming of the Itinerant Justices. Lastly, his *financial* duties also threatened to disappear; for first the assessment of taxes, and then their collection, were made over to special commissioners, while the charters of boroughs removed them in many points from the sheriff's control. But the sheriff could not altogether be dispensed with. He still raised the ferm of the shire and collected the tallage of unchartered towns: he was concerned with purveyance, and for some time helped the special commissioners in the collection of the taxes. Thus though deposed from the supreme place which he had occupied before 1170, the sheriff still retained numerous shreds of his ancient powers. Indeed, his continued importance is attested by the struggle over his appointment in the contests of the thirteenth century, and by the influence which he exercised in the two following centuries over the election of members to Parliament.

Decline of
com-
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While the courts were thus dwindling in the number of their suitors till they tended to disappear altogether, and while the sheriff was being docked of one piece of authority after another, the actual competence of the courts themselves, whether national or feudal, to deal with all important matters was gradually reduced. The extension of Pleas of the Crown and their transference from the sheriffs and then the coroners to the Itinerant Justices, was only the natural corollary to the organization of the judicial body. But the employment of writs, followed by the remedy of the Assize, gradually made the king's court a court of first instance for all England, and practically withdrew from the private courts all valuable jurisdiction over freeholders. The courts, however, still lasted on, acting as delegates of the Crown who could at pleasure evoke all suits to the royal tribunals; until the Statute of Gloucester in 1278 (6 Edw. I. c. 8) was interpreted to mean that no action for more than forty shillings could be tried in a local court. This told alike on the national and feudal courts; and, while the part taken by the shire courts in the election of parliamentary representatives gave them a new lease of life, the feudal courts

entirely disappeared, leaving only the manorial court with jurisdiction over villans.

The second great result of the supremacy of the royal courts was a strong impetus towards the fixing of the form of the Common Law. Up to the time of Edward I the Common Law was definitely an unwritten law, and, although it never entirely ceased to be so, yet it was tending to take a settled form. The causes of this important change were—(a) the establishment of Parliament as the one proper organ of legislation which prevented the unauthorized development of procedure by the issue of new writs; (b) the establishment of a series of precedents by judicial decisions which were considered to have an authority binding on succeeding judges almost equally with acts of the legislature. To these may be added (c) the growth of a class of professional lawyers, as is proved by the publication of such authoritative law-books as those associated with the names of Glanvill, Bracton, Fleta and Britton; and (d) the formulation of the courts of which mention has just been made.

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The Common Law of England may thus be said to consist of three elements:—(1) *Lex non scripta* or *customary law*. Such customs date from remote antiquity 'whereof the memory of man runneth not to the contrary,' and, in order to obtain recognition, they must have existed continuously. A second element is formed by the (2) *Lex scripta* or *statute law*, in which the duty of interpretation devolves on the judges who are guided by various recognized rules or canons of construction. To these may be added (3) *maxims drawn from approved legal authorities*. Up to the reign of Richard II the judges, in deciding a case upon principle for which no direct authority could be cited from the reports of adjudicated cases, would listen to arguments drawn from Roman Law. This put into the hands of the common-law judges a power of innovation and expansion. But in that reign they refused to allow such pleadings for the future; and with the banishment of Roman Law from the courts this power ceased, until competition with Chancery caused the common lawyers once more to adopt those principles by whose application Chancery had obtained such vogue.

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Changes in
Chancery.

to ameliorate the condition of the Common Law as to lessen, if not to shut off altogether, the reasons for the interference of the Chancellor. Two most important results were obtained—(1) owing to the action of two great Chancellors, Lords Hardwicke and Eldon, *the Chancellor's discretion was placed within definable limits*. From the time of the latter 'the development of equity was effected ostensibly and, in the great majority of cases, actually by strict deduction from the principles to be discovered in decided cases, and the work of subsequent Chancery judges has been, for the most part, confined, as Lord Eldon's was, to tracing out these principles into detail and to rationalizing them by repeated review and definition¹.' (2) Owing also to the obstinate refusal of Lord Eldon to surrender any branch of equitable jurisdiction, the great improvement in the remedies given by the Common Law made the jurisdiction of Chancery no longer supplementary to, but merely concurrent with that of the Courts of Common Law. As a consequence, the reform of Chancery procedure in 1833, followed by that of the Common Law in 1852 and 1854, ended finally in *the fusion of Common Law and Equity* by the first Judicature Act of 1873. The result of this and subsequent supplementary Acts has been to consolidate all the existing superior courts into one Supreme Court of Judicature, consisting of two primary divisions—(a) the High Court of Justice consisting of three subdivisions, Chancery; Queen's Bench; Probate, Divorce and Admiralty: (b) the Court of Appeal from the decisions of the judges of each of these subdivisions.

¹ Kerly's
*Hist. of
Equity*,
p. 182.
Cf. also
Maine's
*Ancient
Law*, p. 69.



CHAPTER VIII.

POLICE AND LOCAL ADMINISTRATION.

§ 57. It is difficult to carry our minds back to a time when every one who was not a blood relation, either real or supposed, was an enemy with whom no terms should be kept; or even to the comparatively late period when the peace or guarantee for order lapsed on the death of the king, from whose sanction it was supposed to emanate, until the election of his successor. This 'peace' has been defined as the primitive alliance for mutual good behaviour, a breach of which ipso facto outlawed the transgressor until he had taken measures to repair it¹. It seems to have consisted of three grades. For, firstly, there lay upon the land the *frith* which it was the duty of the local courts of hundred and shire to maintain. Besides this there was the *grith* or special protection under the guarantee of some powerful individual, such as was obtained by commendation. But even beyond these we find mention of a *mund* or personal guardianship, such as a lord would exercise over his household and immediate dependents. According to the closeness of an individual's relations to the guardians of the peace, the protection which he could rely on would be effective or the reverse. Thus the growth of commendation, which was so prominent a feature of the waning Saxon monarchy, would result in the gradual substitution of the royal grith for the old national frith, which was too vague to afford adequate security in dangerous times. The old courts and their officials remained, but the law which they applied would tend to emanate from the king rather than to remain merely a declaration of national customs. This transition was not completely effected until after the Norman Conquest: yet in the last century of Anglo-Saxon rule there are sufficient indications of

Early
System of
Police.

¹ Stubbs,
Const.
Hist. § 72.

- the direction which things were tending to take. Thus Æthelstan's laws mention the king's *oferhyrnes* or a special penalty to be paid for contempt of the royal jurisdiction¹: under Eadmund we find an oath of fealty²; and so great was the desire to obtain justice at first hand from the crown that both Eadgar and Cnut were obliged to enforce resort in the first instance to the local courts³.
- ¹ *Sel. Chart.* p. 66, § 20. These were means of protection for the weak and the innocent. More than one device was necessary in order to secure the guilty. The first in point of moral force and the least modern in idea was an attempt to bind men's consciences and to enlist them on the side of order by the universal *enforcement of an oath for the maintenance of peace*. Thus Eadmund's Oath of Fealty calls on every one to swear 'ut nemo concelet hoc (i.e. treasonable feelings) in fratre vel proximo suo plus quam in extraneo⁴.' Cnut desires 'that every man above xii years old make oath that he will neither be a thief nor cognizant of theft⁵.' Nor did this method die out at the Conquest; for in 1195 knights are assigned or appointed to exact a similar oath from all above the age of fifteen years⁶.
- ² *Ibid.* p. 67, § 1. Doubtless a more effective way was the promotion of a comprehensive *system of suretyship and registration*. This seems to have passed through several stages. All authorities are agreed upon the early responsibility of the kindred for the good behaviour of its members as well as for their protection to the extent of exacting vengeance for wrongs. Of this answerability it cannot be said that on English soil anything more than traces are to be found. It is tending to disappear, but is kept alive by the extreme convenience of so natural a social bond in the last resort. We have had occasion to notice the hold of the kindred on the land⁷. For the payment of the wergild in recompense for a murder, in the absence of paternal relatives, those on the mother's side are responsible for only a part⁸. It is possible that this is a reminiscence of the time when a woman on marriage entered entirely into her husband's family and was quite lost to her own. Under Æthelstan it is the kindred who must find a lord for a stray member or who must otherwise be responsible for producing him when required⁹. This responsibility need not, however, extend to answerability for his crimes unless they attempt to harbour him from justice¹⁰.
- ³ *Ibid.* p. 71, cap. 2 and 73, cap. 17. Oath for maintenance of peace.
- ⁴ *Ibid.* p. 67, § 1.
- ⁵ *Ibid.* p. 74, cap. 21.
- ⁶ *Ibid.* p. 264.
- ⁷ p. 16. Suretyship and Registration.
- ⁸ *Ibid.* p. 63, cap. 27.
- ⁹ *Ibid.* p. 66, § 2, 7, and p. 67, § viii. 2.
- ¹⁰ *Ibid.* p. 67, cap. viii. 2.

In the absence or unwillingness of the kindred there arose a demand that some sort of bail should be required. Sometimes such a demand seems to have arisen with the occasion. Thus, one who fails to attend the gemot thrice or pay the king's oferhyrnes which he has thereby incurred, is to be 'put in borh¹.' Under Eadmund all those labouring under accusations are to be brought 'sub plegio².' The more common provision is for an individual who shall be a kind of perpetual bail for the conduct of another. In the case of dependents this was naturally their lord³. The freeman⁴ had to find some friend who would 'bring and hold him to justice' or would bear the consequences of his escape.

But this does not seem to have been sufficient guarantee. By way of greater security a kind of system of *registration* was adopted. It has been suggested that this was different in town and country. In the towns we find mention, in London of frithgilds, in York of a tenmannetale. Whatever exactly the 'Judicia Civitatis Lundoniae' may be, they are concerned with the division of the people into bodies of ten or twelve⁵. It is to the country districts probably that the law of Cnut referred which bade 'every free man be brought into a hundred and into a tithing⁶.' In this case a tithing was a local subdivision of a hundred 'originating in military necessities and afterwards utilized for other purposes of state.' The 'Laws of Edward the Confessor' speak, in connexion with the tenmannetale or *frithborg*, as it is called elsewhere in England, of a system of mutual responsibility founded on the division into numerical groups of ten⁷. But these Laws are a post-Conquest compilation, and either read the ideas of the Norman times into the age whose history they purport to record, or perhaps confuse two different systems which were in vogue among the Anglo-Saxons. Thus it may be that, in the great towns already alluded to, a new system of joint responsibility on a strict numerical basis sprang up about the time of Æthelstan; while certainly 'no joint responsibility of the rural tithing can be deduced from the Anglo-Saxon laws⁸.'

The most probable account of the origin of the important *institution of Frankpledge* seems to be that it consisted of an union of Eadgar's enactment that every man should have a 'borh' with that of Cnut that he should be in a tithing, and pledge.

¹ *Sel. Chart.*
p. 66, § 20.

² *Ibid.*
p. 67, § 7.

³ *Ibid.*

p. 66,
cap. 7:
p. 67,

cap. 7:
and p. 72,
cap. 1.

⁴ *Ibid.*

p. 71,
cap. 6:
and p. 73,
cap. 20.

⁵ *Ibid.*

p. 67.

⁶ *Ibid.*

p. 73, cap.
20.

⁷ *Ibid.*

p. 77.

⁸ G. W.
Prothero
in *Eng.*
Hist. Rev.
vol. iii.
pp. 6-7.
Frank-
pledge.

that these were drawn together by the addition of the idea of mutual responsibility. But even here such responsibility did not at first extend further than an obligation on a criminal's fellows to clear themselves of complicity in his actions or in

¹*Sel. Chart.* his escape from justice¹. It could not have been long before p. 77, § xx. a further stage was reached; for the Statutes of William I

²*Ibid.* enjoin that in addition the pledges should pay the claim². p. 84, § 8. It may be that this new development of the organization was

brought about in connexion with the Murdrum which William devised for the protection of the Normans. Whatever its exact origin, the system falls under several heads. In the first place, the old distinction seems to have been maintained between those for whom the lord was responsible and those whose obligation was mutual. Thus the 'Laws of Henry I,' which are now accepted as contemporary evidence, divide the hundreds

³*Ibid.* into tithings and lord's pledges³. Again, we are told that in p. 105, § vi. 1 and 106, § viii. 2. the thirteenth century, while in the midlands the frankpledge was *personal*, consisting of groups of ten, the presence of whose chief pledges in the local courts was sufficient representation; in the south of England it was *territorial*, corresponding to the tithing or the township and represented in the courts by the

⁴Maitland, *Select Pleas*, Introd. p. xxx note. reeve and four men⁴. Now, these same Laws of Henry I tell us that only freemen are to be enrolled in a frankpledge⁵. In another place we learn that the reeve and four men are a substitute in the local courts for the lord or his steward⁶; while

⁵*Sel. Chart.* from later authority we learn that the chief members of the p. 106, § viii. 2. frankpledges were the villan tenants of a manor, and that they were used for the presentment of offending members of their body. We may conclude, then, that the answerability of the lord gave way before the prevalence of the sheriff's tourn to the more common system of mutual responsibility, but that where the lord had once exercised this power, the parochial or manorial unit remained, and gave rise to a territorial rather than a personal organization. Thus it is that in the sheriff's tourn, whose chief duty it became to supervise the maintenance of this system of police, the presentment of offenders seems to be made sometimes by the chief pledges or heads of each numerical body of ten, where the frankpledge was personal; sometimes by representatives such as the reeve and four men, where it was upon a territorial basis.

where it was upon a territorial basis.

Alongside of the frankpledge grew up the *Murdrum*. For Murdrum. the better protection of the Normans William I ordained that in the case of a murdered man his lord should either produce the homicide or pay as much of the large sum of 46 marks of silver as he was able, the residue being made up by the neighbouring hundred¹. By interpretation of the lawyers this came to mean that the burden of proof that the murdered man was not a Norman should lie upon the hundred in which the corpse was found: otherwise the heavy fine should be exacted. But here, as elsewhere, exemptions from its operation were granted to favoured districts. In the case of both Frankpledge and Murdrum the institution was maintained as a mere means of extorting money, long after it had lost any basis in reason. This is the meaning of a clause added to the Charter in its second reissue under Henry III, by which the sheriff is forbidden to hold his tourn more than twice a year or to seek opportunities, other than those enjoyed by his predecessors under Henry II, for taking view of frankpledge². But further,² *Ibid.* the Barons complain in their Petition (1258) at the Parliament of Oxford, that the sheriffs, at both annual tourns, require the personal attendance of earls and barons who hold lands in different districts and counties, and fine them heavily if they do not come³. Accordingly, the Provisions of Westminster³ *Ibid.* (1259) release from ordinary attendance all of the rank of *barones*, excuse them from liability in any district except that in which they live, and enjoin the observance of the clause of the Charter in the matter⁴. In the same way, although⁴ *Ibid.* the author of the 'Dialogus de Scaccario,' writing in the reign of Henry II, alludes to the complete intermingling of the free classes in the country, which makes it impossible, a century after the Conquest, to distinguish a Norman from an Englishman⁵; yet we not only find the Presentment of Englishry, into which the Murdrum had now passed, kept up, but its use is pressed in the most unjustifiable manner. Thus the Barons in their Petition of 1258 again complain that, although in the time of dearth men are found dead from want of food, the district is fined before the justices *tanquam de murdro*⁶. The system may still have been found a useful check on violence or an aid in the detection of crime, for the Provisions of Westminster (§ 22) content themselves with enjoining that

¹ *Sel. Chart.*
p. 84, § 3.

² *Ibid.*
p. 346,
§ 42.

³ *Ibid.*
p. 384, § 17.

⁴ *Ibid.*
p. 402, § 4.

⁵ *Ibid.*
pp. 201-2.

⁶ *Ibid.*
p. 385, § 21.

such fine should only be exacted in the case of those feloniously slain¹.

¹ *Sel. Chart.*
p. 405.

Regulations about
Vagrants.

² *Ibid.*

p. 145, § 16;
p. 151, § 2;
375, § 4;
and p. 471,
§ 4.

³ *Ibid.*

p. 145.

⁴ *Ibid.*

p. 375, § 4.

Watch and
Ward.

⁵ *Ibid.*

pp. 362-3.

Both these methods, although sufficiently tenacious, would die out or be superseded in course of time. The sheriff's tourn and the private leet gave way to the reign of the justices of the peace. But the idea of responsibility did not altogether disappear. For meanwhile, in the case of casual strangers whom the mediaeval law regarded with the utmost suspicion, responsibility was enforced on all who harboured them for more than a day². Doubtless such vagrants would consist almost entirely of fugitive villans from the manors; so that, although, on the one side, a lengthened residence in a chartered borough was allowed, perhaps in the interests of the borough's privileges, to confer the boon of freedom; yet nothing must be done to aid such restless movement. Thus the sheriff by the Assize of Clarendon (§ 18) is to keep a register of all who have left their own shires, and if they are not to be found, their chattels are forfeit to the king³. Again, a sojourner for more than one night (§ 16) may be detained until he can find bail, or, in the milder terms of Henry III's legislation, unless his host will answer for him⁴, a precaution which does not seem to have been necessary in harvest time. The Black Death gave an enormous impulse to this wandering spirit, and led to strong and afterwards discriminative legislation, the conduct of which was entrusted chiefly to the holders of the new office of justice of the peace.

The final regulation to be noticed is the provision made for the detection of actual fugitives from justice. In the first place, the duty of the modern police constable seems in Anglo-Saxon times to have been shared by all members of the fyrd, and, however much or little this may have meant, no further or more effective arrangements are found until the reign of Henry III. In a writ of 1233 for the conservation of the peace, provision is made for the regular nightly guard at city gates of at least four men who shall detain strangers and give the alarm in the case of fugitives⁵. The importance attached to the punishment of a defaulting watcher is shown by subjecting him not to the sheriff but to the Itinerant Justices. Writs of 1252 and 1253 repeat and confirm these regulations, and bring them into connexion with two important institutions—the Assize of Arms or

maintenance of the fyrd, and the Hue and Cry or ancient method of pursuit of criminals¹. It will in a subsequent chapter be pointed out that the fyrd was the basis of the duty of watch and ward. The *Hue and Cry* dates back to Eadgar's Ordinance of the Hundred, where regulations are laid down for the pursuit of criminals from one hundred and even one tithing to another by the entire population². The same liability of all to help in the arrest, which to this day forms part of the Common Law of England, was applied to the boroughs by Æthelred³. Possibly the duty of local presentment and the formation and liability of the frankpledge may have obscured this use of a *levée en masse* as a means of direct arrest. But it reappears under Richard I in connexion with the oath for the preservation of the peace⁴. Under Henry III, in the writs already quoted, the duty is primarily entrusted to the special *vigilatores* or appointed watchers: twenty years later a special officer, the constable, is added for this very purpose⁵. Finally, the whole mediaeval police system, on its active and aggressive side, is drawn together in Edward I's Statute of Winchester (1285), by which provision is made for the Assize of Arms (§ 6), the presentment of offences (§ 1), the responsibility of the hundred (§ 2), the maintenance of watch and ward, and the levy of hue and cry (§ 4). The Assize of Arms is to be carried out by the constables; the sheriffs raise the hue and cry and keep suspected criminals, and the justices maintain a general and coercive supervision over the entire arrangements⁶.

§ 58. With the decay of the sheriff's power fell the system of police of which he had been the centre. The official who ultimately succeeded to his place was the *Justice of the Peace*, under whom the units of administration were the shire or county and the parish. The hundred as an administrative unit simply disappeared, and, besides the name, the only survival of its old functions is its liability for damages in the event of a riot.

The origin of the Justice of the Peace is to be found in Richard I's proclamation of 1195 when knights were assigned or appointed to receive from all above the age of fifteen the oaths for the maintenance of the peace⁷. Occasionally, under Henry III (1230, 1253, 1264), a similar mode of appointment was adopted. Under Edward I in 1277 *custodes*, and in 1285,

¹ *Sel. Chart.* pp. 371-2 and 375.

Hue and Cry.

² *Ibid.*

p. 70.

³ *Ibid.*

p. 72, § ii.

⁴ *Ibid.*

cap. 6.

⁵ *Ibid.*

p. 264.

⁶ *Ibid.*

p. 372.

⁷ *Ibid.*

p. 470-4.

to carry out the Statute of Winchester, *conservatores pacis* were elected in the shire courts. Under Edward III the system was finally established. In 1327 the conservators of the peace were again assigned or nominated by the Crown (1 Edw. III, st. ii, § 16), thus becoming definitely royal commissioners and losing all connexion with the shire court. Hitherto these officials had had merely executive power, 'they were little more than constables on a large scale'.¹ But in 1328 they were for the first time entrusted with judicial functions; for in connexion with the execution of the Statute of Winchester they were authorized to examine and punish evil doers. In 1330 these magistrates may take indictments for trial before the justices of gaol delivery, and persons so indicted may not ordinarily be bailed by the sheriff. It was an important advance in 1344 (18 Edw. III, st. ii, § 2) when these officials were made a permanent staff of royal *custodes pacis*, ready to be appointed 'with other wise and learned in the law' to judicial functions should need arise. Thus these guardians of the peace have become a permanent body endowed on occasion with the duty of judges. Finally, in 1360 (34 Edw. III, c. 1) 'a lord and three or four of the most worthy, together with some learned in the law, were authorized to seize, examine and punish, by common or statute law, or according to their best judgment, all disturbers of the peace; on complaint in the king's name, to hear and determine felonies, or on suspicion to arrest and imprison all dangerous persons, or to take surety for their good behaviour.'

¹ Stephen,
Hist.Crim.
Law, i.
112.

His gradual
supersession of the
Shire
Court.

There were now two bodies existing side by side, the shire court and the justices; and during the next century the powers of the former were gradually transferred to the newer organization. We have seen that all the better members of the shire court had gained exemption from attendance, and that the sheriff's judicial powers had been made over to the Itinerant Justices. The shire court remained for the election of coroners, verderers and knights of the shire; but to the justices sitting in quarter sessions were transferred not only all the *criminal* jurisdiction which remained to the shire court in the fourteenth century, but even the right to hear and determine the Pleas of the Crown, those graver offences of which the sheriff and all other local officers had by Magna Carta been

deprived. Indeed, all crimes and felonies, except treason, were by their commission conferred upon the assembled justices, until Quarter Sessions became a serious rival to the Itinerant Justices or, as they were now called, the Judges of Assize. But after the Tudor times it became customary to reserve cases involving capital offences for the Judges of Assize; although the jurisdiction of Quarter Sessions in such matters was not abrogated until 1842 (5 & 6 Vict. c. 38). Again, although essentially criminal tribunals, Quarter Sessions had originally a limited authority in civil suits, which during the sixteenth century had been increased, until here, too, the power of the justices became practically coordinate with that of the Assizes. This, however, was a weak point, and led to the establishment, in the present century, of the so-called County Courts. But an equally important side of the powers of the general body of justices dealt with local administration. Quarter Sessions became the executive and *administrative* body for the shire. All the old local officials became the servants of the justices and often their nominees. The sheriffs themselves, the constables, and manorial bailiffs were forced to attend their orders and to execute their decrees: the coroner was made answerable to them. Again, they took the place of the sheriff, and their sessions that of the shire court, as the medium of communication between the crown and the people. Thus all letters from the Council were addressed to them, and under the Stuarts they were used as the great agents of government in the demands for purveyance, benevolences, forced loans and shipmoney. They were also the *fiscal* board of the shire, with the duty of assessing, levying, and superintending the expenditure of a county rate. And finally, their general administrative authority touched such important matters as the settlement of wages and of prices, the enforcement of laws against recusants and nonconformists, the maintenance of bridges, roads for the most part, prisons and public buildings of all kinds. Indeed, from the first the justice seems to have assumed the position which has been well described as that of 'the State's man-of-all-work.'

Thus was gradually consolidated that monopoly of the upper class in administration, that local rule of the landed gentry, which foreigners more than native writers have picked out as

¹ E.g. Dr. Gneist and M. Boutmy. Appointment and qualification.

so characteristic of the modern English constitution¹. In origin and theory the justices were mere delegates of the royal power, appointed perhaps originally by the king, then under the Tudors by the Chancellor, and at present by the Crown, on the recommendation of the Lord Lieutenant of the shire, though removable for misconduct by the Chancellor. Up to the middle of the fifteenth century the qualification for the office was vaguely stated as worthiness or sufficiency; but in 1440 (18 Henry VI, c. 11) the appointment of men of small estate who used the office for mere purpose of extortion, caused a definite requirement of lands or tenements to the value of £20 a year, the original amount of a knight's fee. Three centuries later (18 Geo. II) this was raised to £100 in land or houses except in the case of certain individuals exempted by exalted birth or legal training. Originally and in accordance with statute (12 Ric. II, c. 10), a fixed payment of four shillings a day during sessions was made to the justices. Now, however, it is entirely honorary. The object of all later statutes was to place the office in the hands of men who would not need payment, and would, therefore, presumably be above taking bribes. As a proof of this, although the absence of restriction as to the number of these officials in the Act of 1360 was remedied in 1388 (12 Ric. II, c. 10) by the reduction of the legal number in each shire to six besides the Judges of Assize, who were always included in the commission, yet this restriction was soon disregarded. Towards the close of Elizabeth's reign (1592) no less than fifty-five are enumerated in Devonshire alone. The smallest counties now contain many more than six, the largest, Lancashire, more than 800. The whole number must be little short of 20,000, but considerably less than half of these are 'active' justices who have taken the requisite oaths and received from Chancery the necessary writ of power. The extent of the jurisdiction entrusted to the justices was only gradually determined by a number of individual statutes which conferred on them special powers. In this way the commission of the justices had, by the time of Elizabeth, become so stuffed with the substance of these individual statutes that it was confused and often unintelligible, so that a writer feared lest the backs of the justices would be broken by these 'not loads but stacks

of statutes.' The result was that, in 1590, Sir Christopher Wray, Chief Justice of the King's Bench, drew up a new form of commission, which remains practically unaltered to the present day. In this is recognized the double capacity of the justices as administrators, by the authority given them to execute all statutes for the maintenance of the peace without enumerating such enactments individually; and as judicial officers, by the power conferred on any two justices to hear and determine, by the oath of good and lawful men of the county, a number of offences enumerated in the commission. This latter power at first depended on a provision that one of the justices (quorum) who heard such cases should be of a select number whose names were expressly repeated in the document because they were, as the statute of 1360 had demanded, 'learned in the law.' In consequence of this clause it was, until comparatively lately, customary to omit a few names from those of the quorum 'for the sake of propriety.' Now, however, all the commissioned justices are included, so that the expression has entirely lost its meaning. But it is to be noticed that, despite the apparently complete character of this commission, it was considered necessary to confirm by definite statute powers long exercised by the justices. Thus, in earlier days the power of preliminary inquiry, though exercised almost from the institution of the office, was not conferred by statute until 1554 (1 & 2 Phil. & Mary, c. 13). Again, the law gave the justices no other authority for the apprehension of offenders than was by the Common Law inherent in every constable and, indeed, in every private person. It has been suggested that the power to issue warrants of arrest was the outcome of the old duty which lay upon local officers of starting the hue and cry. However that may be, such power of arrest and examination has now been regulated by a series of statutes beginning from the reign of George I. A foreign writer (M. Boutmy¹) has remarked that the most characteristic trait of this new jurisdiction is its utter independence of a feudal origin. It is a revocable delegation, not a dismemberment, of the judicial authority of the Crown. The possession of landed property is not in theory, though in practice, the basis of the power of a justice of the peace; but the limits of his jurisdiction are quite independent of such a consideration, which, on the other hand,

¹ *Eng. Const.*
(trans.)
p. 114.

was of the essence of feudal authority. It is only to be expected, therefore, that the development of the office of justice of the peace is chiefly to be traced to the period of the definite break-up of feudal jurisdictions. It is to the time of the Tudors, then, that we must look for the reconstruction of English local government on the ruins of the sheriff and the manor. But on the one side, the shire remains the unit of jurisdiction. Thus a new official, a Lord Lieutenant, was appointed under Henry VIII to take up the military duties of the sheriff. He was, and is generally, like the old ealdorman, a local nobleman, and also *custos rotulorum* or keeper of the records, in which capacity he is the head of the justices for the county. His military duties were, however, taken away and revested in the Crown in 1871. In the same way, the justices were appointed for the whole shire, though convenience decided that for ordinary purposes their activity should be limited to their respective neighbourhoods. But it was not until 1828 that such division was recognized by statute. Again, even within a narrower limit there are certain duties which can be performed by a single justice. It is necessary, therefore, in speaking of the justices of the peace, to distinguish between the powers of the single justice, of Petty or Special Sessions, and of Quarter or General Sessions.

Powers of
a single
justice.

As an administrator, *the single justice*, in his primary capacity of conservator of the peace, can issue warrants of all kinds, can give orders to police constables for the preservation of the peace and, on extreme occasions under the so-called Riot Act, can himself intervene. On him also have been laid an immense variety of police regulative duties, the number of which can only be adequately realized from practical knowledge. In his second capacity of judge, the justice acquired the duty of the sheriff in his tourn of conducting preliminary examinations of persons charged with crimes and felonies. Of this the sheriff was deprived in 1461 (1 Edw. IV, c. 2) and, as we have seen, the justices used the power long before it was conferred on them by statute in 1554. The further power of hearing and determining minor criminal cases without the aid of a jury was wholly the creation of statutes. It grew up in a curious accidental fashion. Statute after statute prescribed that this or that petty offence might be punished sometimes by

one justice, sometimes by two or more, but very seldom was the slightest hint given as to how, or when, or where, the case was to be tried. Only in the present century have we begun to think of the summary jurisdiction as normal, and to regulate by general statutes the mode in which it must be exercised. There are traces of this power even under the Tudors, but chiefly employed by the justices in their capacity of 'mere police or administrative agents.' But gradually a regular procedure was developed, helped by the definite authority conferred by statute, until in 1879 such authority was reduced to cases which did not involve more than a fortnight's imprisonment or a fine of twenty shillings.

But in the majority of cases matters to be dealt with out of Quarter Sessions were entrusted by statute to two or more justices. A meeting for this purpose was known as *Petty Sessions*; while, if they were duties to be performed at fixed times, such meetings for their discharge were called 'special or special petty sessions.' The two, however, were amalgamated in practice. This may be said to have answered roughly to the old hundred jurisdiction, as more recently it was attempted to make the divisions for such sessions correspond with the modern poor-law union. In this way the justices, though nominally appointed for the whole shire, now discharge a great portion of their work in the petty sessional division in which they reside; and have for that division a court-house, a chairman, and a regularly constituted 'bench.' The duties of the magistrates in petty sessions are very like those which the single magistrate is competent to discharge, but apply to cases which an individual has no power to touch. The justice is mostly of a penal kind, involving the infliction of fines or imprisonment. So far as it is summary, it is dependent entirely upon statute; but the extent of it may be guessed from the fact that more than 700,000 cases are annually so decided; while, even in matters accounted truly criminal, the cases so tried in every department of justice outnumber those to which a jury is applied. But the court has also a real civil jurisdiction in certain limited cases which need not here be specified. Of these even the recently formed County Courts have not robbed it. A very large portion of its power was administrative, especially by way of supervision, though this was seriously

curtailed by the creation of County Councils. Thus to the justices in petty sessions was given the important power of granting licences of all kinds, much of which they still retain; while in their hands rested the appointment of all manner of local officials, overseers of the poor and of highways, parish and county constables and others, the account of whom would lead us into endless detail.

Quarter
Sessions.

Above the petty and special sessions towers the *Quarter Sessions* consisting in theory of all the justices in the shire, although any two may hold a legal session. Of the *quorum* mention has been made. In 1362 (36 Edw. III, st. 1, § 12) it was enacted that the justices should make their sessions four times a year, and in 1388 (12 Ric. II, c. 10) this was confirmed and enforced, if necessary, by penalties. Under Henry IV provision was made for other meetings of the same body, and these were in contradistinction called General Sessions. These distinctions, however, are of no importance, for powers given to the justices by statute may in almost every case be exercised indifferently in both assemblies. The high powers which Quarter Sessions exercised until recently have been already noted. But although the justices have been deprived of power of life and death, of the trial of offences involving penal servitude for life, of many of the more serious misdemeanours, such as perjury, forgery, and others; yet three-quarters of the criminal trials still take place in borough and county sessions, so that they exercise a very real, though diminished, power. Such cases are of course tried with a petty jury on presentation by the grand jury. But the Quarter Sessions also hears without jury appeals from the summary jurisdiction of individual magistrates or of petty sessions. Enough has perhaps already been said as to the administrative work of the Quarter Sessions. It is sufficient to repeat that until lately it formed a general Court of Appeal on all fiscal and regulative matters connected with the shire. But the Act establishing the *County Councils*, which came into being in April, 1889 (51 & 52 Vict. c. 41) while leaving to the justices of the peace 'their judicial authority together with the general execution of certain licence laws, and a share in the management of the county police,' transferred to a more or less popularly-elected body, called a County Council, almost all

County
Councils.

the general administrative functions, such as the control of local finance, of pauper lunatic asylums, of reformatory and industrial schools, of county buildings and property, jurisdiction over weights and measures, roads and bridges, and the appointment of many county officers, such as the coroner. Other officials, such as the clerk of the peace and the chief constable, are appointed, and the latter, together with the county police force, supervised, by a joint committee of the Quarter Sessions and the County Council. It has been noticed that the weakest point in the position of the justices was their limited jurisdiction in civil cases. Indeed, up to 1846, justice in such cases 'was, as a rule, only to be obtained at Westminster, or by means of an action begun at Westminster and tried under a commission of Assize on circuit'.¹ During the last century, a remedy was attempted by 'the occasional and sporadic creation of little courts, courts of conscience or courts of requests: about a hundred of these were erected as now this town, now that, made its voice heard. In general a body of unpaid commissioners, of local tradesmen or the like, was empowered to adjudicate without jury upon very small debts'.² The first general remedy was an Act of 1846 which divided the country into circuits, to each of which was assigned a separate judge. These circuit divisions had no reference to the counties, so that the title is an entire misnomer. Moreover each circuit is divided into districts, and each district has a separate court. The courts were at first limited to the recovery of small debts, but their jurisdiction has been gradually extended by statute until they now form a real relief to the judges of the High Court. The judges of these courts are appointed and are dismissible by the Lord Chancellor. Appeals from the judgment of these courts go to the High Court and, with the leave of the judges there, to the Court of Appeal, and finally to the House of Lords.

Apart from this general system, and existing before it, are some twenty-eight *local courts of record*, each with a history of its own. Such are the Chancery of the Duchy of Lancaster and the Vice-Warden's Court of the Stannaries, the Lord Mayor's Court in London, the Hundred Court of Salford, the Liverpool Court of Passage, the Tolzey and Pie Poudre Court at Bristol, beside those in a few other chartered boroughs.

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Both these methods, although sufficiently tenacious, would die out or be superseded in course of time. The sheriff's tourn and the private leet gave way to the reign of the justices of the peace. But the idea of responsibility did not altogether disappear. For meanwhile, in the case of casual strangers whom the mediaeval law regarded with the utmost suspicion, responsibility was enforced on all who harboured them for more than a day².

²*Ibid.*

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Doubtless such vagrants would consist almost entirely of fugitive villans from the manors; so that, although, on the one side, a lengthened residence in a chartered borough was allowed, perhaps in the interests of the borough's privileges, to confer the boon of freedom; yet nothing must be done to aid such restless movement. Thus the sheriff by the Assize of Clarendon (§ 18) is to keep a register of all who have left their own shires, and if they are not to be found, their chattels are forfeit to the king³. Again, a sojourner for more than one night (§ 16) may be detained until he can find bail, or, in the milder terms of Henry III's legislation, unless his host will answer for him⁴, a precaution which does not seem to have been necessary in harvest time. The Black Death gave an enormous impulse to this wandering spirit, and led to strong and afterwards discriminative legislation, the conduct of which was entrusted chiefly to the holders of the new office of justice of the peace.

³*Ibid.*

p. 145.

⁴*Ibid.*

p. 375, § 4.

Watch and
Ward.

The final regulation to be noticed is the provision made for the detection of actual fugitives from justice. In the first place, the duty of the modern police constable seems in Anglo-Saxon times to have been shared by all members of the fyrd, and, however much or little this may have meant, no further or more effective arrangements are found until the reign of Henry III. In a writ of 1233 for the conservation of the peace, provision is made for the regular nightly guard at city gates of at least four men who shall detain strangers and give the alarm in the case of fugitives⁵. The importance attached to the punishment of a defaulting watcher is shown by subjecting him not to the sheriff but to the Itinerant Justices. Writs of 1252 and 1253 repeat and confirm these regulations, and bring them into connexion with two important institutions—the Assize of Arms or

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maintenance of the fyrd, and the Hue and Cry or ancient method of pursuit of criminals¹. It will in a subsequent chapter be pointed out that the fyrd was the basis of the duty of watch and ward. The *Hue and Cry* dates back to Eadgar's Ordinance of the Hundred, where regulations are laid down for the pursuit of criminals from one hundred and even one tithing to another by the entire population². The same liability of all to help in the arrest, which to this day forms part of the Common Law of England, was applied to the boroughs by Æthelred³. Possibly the duty of local presentment and the formation and liability of the frankpledge may have obscured this use of a *levée en masse* as a means of direct arrest. But it reappears under Richard I in connexion with the oath for the preservation of the peace⁴. Under Henry III, in the writs already quoted, the duty is primarily entrusted to the special *vigilatores* or appointed watchers: twenty years later a special officer, the constable, is added for this very purpose⁵. Finally, the whole mediaeval police system, on its active and aggressive side, is drawn together in Edward I's Statute of Winchester (1285), by which provision is made for the Assize of Arms (§ 6), the presentment of offences (§ 1), the responsibility of the hundred (§ 2), the maintenance of watch and ward, and the levy of hue and cry (§ 4). The Assize of Arms is to be carried out by the constables; the sheriffs raise the hue and cry and keep suspected criminals, and the justices maintain a general and coercive supervision over the entire arrangements⁶.

§ 58. With the decay of the sheriff's power fell the system of police of which he had been the centre. The official who ultimately succeeded to his place was the *Justice of the Peace*, under whom the units of administration were the shire or county and the parish. The hundred as an administrative unit simply disappeared, and, besides the name, the only survival of its old functions is its liability for damages in the event of a riot.

The origin of the Justice of the Peace is to be found in Richard I's proclamation of 1195 when knights were assigned or appointed to receive from all above the age of fifteen the oaths for the maintenance of the peace⁷. Occasionally, under Henry III (1230, 1253, 1264), a similar mode of appointment was adopted. Under Edward I in 1277 *custodes*, and in 1285,

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pp. 371-2
and 375.

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² *Ibid.*

p. 70.

³ *Ibid.*

p. 72, § ii.
cap. 6.

⁴ *Ibid.*

p. 264.

⁵ *Ibid.*

p. 372.

⁶ *Ibid.*

pp. 470-4.

Justice of
the Peace.

⁷ *Ibid.*

p. 264.

to carry out the Statute of Winchester, *conservatores pacis* were elected in the shire courts. Under Edward III the system was finally established. In 1327 the conservators of the peace were again assigned or nominated by the Crown (1 Edw. III, st. ii, § 16), thus becoming definitely royal commissioners and losing all connexion with the shire court. Hitherto these officials had had merely executive power, 'they were little more than constables on a large scale'.¹ But in 1328 they were for the first time entrusted with judicial functions; for in connexion with the execution of the Statute of Winchester they were authorized to examine and punish evil doers. In 1330 these magistrates may take indictments for trial before the justices of gaol delivery, and persons so indicted may not ordinarily be bailed by the sheriff. It was an important advance in 1344 (18 Edw. III, st. ii, § 2) when these officials were made a permanent staff of royal *custodes pacis*, ready to be appointed 'with other wise and learned in the law' to judicial functions should need arise. Thus these guardians of the peace have become a permanent body endowed on occasion with the duty of judges. Finally, in 1360 (34 Edw. III, c. 1) 'a lord and three or four of the most worthy, together with some learned in the law, were authorized to seize, examine and punish, by common or statute law, or according to their best judgment, all disturbers of the peace; on complaint in the king's name, to hear and determine felonies, or on suspicion to arrest and imprison all dangerous persons, or to take surety for their good behaviour.'

¹ Stephen,
Hist.Crim.
Law, i.
112.

His gradual
supersession
of the
Shire
Court.

There were now two bodies existing side by side, the shire court and the justices; and during the next century the powers of the former were gradually transferred to the newer organization. We have seen that all the better members of the shire court had gained exemption from attendance, and that the sheriff's judicial powers had been made over to the Itinerant Justices. The shire court remained for the election of coroners, verderers and knights of the shire; but to the justices sitting in quarter sessions were transferred not only all the *criminal* jurisdiction which remained to the shire court in the fourteenth century, but even the right to hear and determine the Pleas of the Crown, those graver offences of which the sheriff and all other local officers had by Magna Carta been

deprived. Indeed, all crimes and felonies, except treason, were by their commission conferred upon the assembled justices, until Quarter Sessions became a serious rival to the Itinerant Justices or, as they were now called, the Judges of Assize. But after the Tudor times it became customary to reserve cases involving capital offences for the Judges of Assize; although the jurisdiction of Quarter Sessions in such matters was not abrogated until 1842 (5 & 6 Vict. c. 38). Again, although essentially criminal tribunals, Quarter Sessions had originally a limited authority in civil suits, which during the sixteenth century had been increased, until here, too, the power of the justices became practically coordinate with that of the Assizes. This, however, was a weak point, and led to the establishment, in the present century, of the so-called County Courts. But an equally important side of the powers of the general body of justices dealt with local administration. Quarter Sessions became the executive and *administrative* body for the shire. All the old local officials became the servants of the justices and often their nominees. The sheriffs themselves, the constables, and manorial bailiffs were forced to attend their orders and to execute their decrees: the coroner was made answerable to them. Again, they took the place of the sheriff, and their sessions that of the shire court, as the medium of communication between the crown and the people. Thus all letters from the Council were addressed to them, and under the Stuarts they were used as the great agents of government in the demands for purveyance, benevolences, forced loans and shipmoney. They were also the *fiscal* board of the shire, with the duty of assessing, levying, and superintending the expenditure of a county rate. And finally, their general administrative authority touched such important matters as the settlement of wages and of prices, the enforcement of laws against recusants and nonconformists, the maintenance of bridges, roads for the most part, prisons and public buildings of all kinds. Indeed, from the first the justice seems to have assumed the position which has been well described as that of 'the State's man-of-all-work.'

Thus was gradually consolidated that monopoly of the upper class in administration, that local rule of the landed gentry, which foreigners more than native writers have picked out as

¹ E.g. Dr. Gneist and M. Boutmy.

Appoint-
ment and
qualifica-
tion.

so characteristic of the modern English constitution¹. In origin and theory the justices were mere delegates of the royal power, appointed perhaps originally by the king, then under the Tudors by the Chancellor, and at present by the Crown, on the recommendation of the Lord Lieutenant of the shire, though removable for misconduct by the Chancellor. Up to the middle of the fifteenth century the qualification for the office was vaguely stated as worthiness or sufficiency; but in 1440 (18 Henry VI, c. 11) the appointment of men of small estate who used the office for mere purpose of extortion, caused a definite requirement of lands or tenements to the value of £20 a year, the original amount of a knight's fee. Three centuries later (18 Geo. II) this was raised to £100 in land or houses except in the case of certain individuals exempted by exalted birth or legal training. Originally and in accordance with statute (12 Ric. II, c. 10), a fixed payment of four shillings a day during sessions was made to the justices. Now, however, it is entirely honorary. The object of all later statutes was to place the office in the hands of men who would not need payment, and would, therefore, presumably be above taking bribes. As a proof of this, although the absence of restriction as to the number of these officials in the Act of 1360 was remedied in 1388 (12 Ric. II, c. 10) by the reduction of the legal number in each shire to six besides the Judges of Assize, who were always included in the commission, yet this restriction was soon disregarded. Towards the close of Elizabeth's reign (1592) no less than fifty-five are enumerated in Devonshire alone. The smallest counties now contain many more than six, the largest, Lancashire, more than 800. The whole number must be little short of 20,000, but considerably less than half of these are 'active' justices who have taken the requisite oaths and received from Chancery the necessary writ of power. The extent of the jurisdiction entrusted to the justices was only gradually determined by a number of individual statutes which conferred on them special powers. In this way the commission of the justices had, by the time of Elizabeth, become so stuffed with the substance of these individual statutes that it was confused and often unintelligible, so that a writer feared lest the backs of the justices would be broken by these 'not loads but stacks

of statutes.' The result was that, in 1590, Sir Christopher Wray, Chief Justice of the King's Bench, drew up a new form of commission, which remains practically unaltered to the present day. In this is recognized the double capacity of the justices as administrators, by the authority given them to execute all statutes for the maintenance of the peace without enumerating such enactments individually; and as judicial officers, by the power conferred on any two justices to hear and determine, by the oath of good and lawful men of the county, a number of offences enumerated in the commission. This latter power at first depended on a provision that one of the justices (quorum) who heard such cases should be of a select number whose names were expressly repeated in the document because they were, as the statute of 1360 had demanded, 'learned in the law.' In consequence of this clause it was, until comparatively lately, customary to omit a few names from those of the quorum 'for the sake of propriety.' Now, however, all the commissioned justices are included, so that the expression has entirely lost its meaning. But it is to be noticed that, despite the apparently complete character of this commission, it was considered necessary to confirm by definite statute powers long exercised by the justices. Thus, in earlier days the power of preliminary inquiry, though exercised almost from the institution of the office, was not conferred by statute until 1554 (1 & 2 Phil. & Mary, c. 13). Again, the law gave the justices no other authority for the apprehension of offenders than was by the Common Law inherent in every constable and, indeed, in every private person. It has been suggested that the power to issue warrants of arrest was the outcome of the old duty which lay upon local officers of starting the hue and cry. However that may be, such power of arrest and examination has now been regulated by a series of statutes beginning from the reign of George I. A foreign writer (M. Boutmy¹) has remarked that the most characteristic trait of this new jurisdiction is its utter independence of a feudal origin. It is a revocable delegation, not a dismemberment, of the judicial authority of the Crown. The possession of landed property is not in theory, though in practice, the basis of the power of a justice of the peace; but the limits of his jurisdiction are quite independent of such a consideration, which, on the other hand,

*Eng.
Const.
(trans.)
p. 114.*

was of the essence of feudal authority. It is only to be expected, therefore, that the development of the office of justice of the peace is chiefly to be traced to the period of the definite break-up of feudal jurisdictions. It is to the time of the Tudors, then, that we must look for the reconstruction of English local government on the ruins of the sheriff and the manor. But on the one side, the shire remains the unit of jurisdiction. Thus a new official, a Lord Lieutenant, was appointed under Henry VIII to take up the military duties of the sheriff. He was, and is generally, like the old ealdorman, a local nobleman, and also *custos rotulorum* or keeper of the records, in which capacity he is the head of the justices for the county. His military duties were, however, taken away and revested in the Crown in 1871. In the same way, the justices were appointed for the whole shire, though convenience decided that for ordinary purposes their activity should be limited to their respective neighbourhoods. But it was not until 1828 that such division was recognized by statute. Again, even within a narrower limit there are certain duties which can be performed by a single justice. It is necessary, therefore, in speaking of the justices of the peace, to distinguish between the powers of the single justice, of Petty or Special Sessions, and of Quarter or General Sessions.

Powers of
a single
justice.

As an administrator, *the single justice*, in his primary capacity of conservator of the peace, can issue warrants of all kinds, can give orders to police constables for the preservation of the peace and, on extreme occasions under the so-called Riot Act, can himself intervene. On him also have been laid an immense variety of police regulative duties, the number of which can only be adequately realized from practical knowledge. In his second capacity of judge, the justice acquired the duty of the sheriff in his tour of conducting preliminary examinations of persons charged with crimes and felonies. Of this the sheriff was deprived in 1461 (1 Edw. IV, c. 2) and, as we have seen, the justices used the power long before it was conferred on them by statute in 1554. The further power of hearing and determining minor criminal cases without the aid of a jury was wholly the creation of statutes. It grew up in a curious accidental fashion. Statute after statute prescribed that this or that petty offence might be punished sometimes by

one justice, sometimes by two or more, but very seldom was the slightest hint given as to how, or when, or where, the case was to be tried. Only in the present century have we begun to think of the summary jurisdiction as normal, and to regulate by general statutes the mode in which it must be exercised. There are traces of this power even under the Tudors, but chiefly employed by the justices in their capacity of 'mere police or administrative agents.' But gradually a regular procedure was developed, helped by the definite authority conferred by statute, until in 1879 such authority was reduced to cases which did not involve more than a fortnight's imprisonment or a fine of twenty shillings.

But in the majority of cases matters to be dealt with out of Quarter Sessions were entrusted by statute to two or more justices. A meeting for this purpose was known as *Petty Sessions*; while, if they were duties to be performed at fixed times, such meetings for their discharge were called 'special or special petty sessions.' The two, however, were amalgamated in practice. This may be said to have answered roughly to the old hundred jurisdiction, as more recently it was attempted to make the divisions for such sessions correspond with the modern poor-law union. In this way the justices, though nominally appointed for the whole shire, now discharge a great portion of their work in the petty sessional division in which they reside; and have for that division a court-house, a chairman, and a regularly constituted 'bench.' The duties of the magistrates in petty sessions are very like those which the single magistrate is competent to discharge, but apply to cases which an individual has no power to touch. The justice is mostly of a penal kind, involving the infliction of fines or imprisonment. So far as it is summary, it is dependent entirely upon statute; but the extent of it may be guessed from the fact that more than 700,000 cases are annually so decided; while, even in matters accounted truly criminal, the cases so tried in every department of justice outnumber those to which a jury is applied. But the court has also a real civil jurisdiction in certain limited cases which need not here be specified. Of these even the recently formed County Courts have not robbed it. A very large portion of its power was administrative, especially by way of supervision, though this was seriously

curtailed by the creation of County Councils. Thus to the justices in petty sessions was given the important power of granting licences of all kinds, much of which they still retain ; while in their hands rested the appointment of all manner of local officials, overseers of the poor and of highways, parish and county constables and others, the account of whom would lead us into endless detail.

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² *Ibid.* p. 70.

³ *Ibid.* p. 72, § ii. cap. 6.

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pp. 470-4.

⁷ *Ibid.* p. 264.

to carry out the Statute of Winchester, *conservatores pacis* were elected in the shire courts. Under Edward III the system was finally established. In 1327 the conservators of the peace were again assigned or nominated by the Crown (1 Edw. III, st. ii, § 16), thus becoming definitely royal commissioners and losing all connexion with the shire court. Hitherto these officials had had merely executive power, 'they were little more than constables on a large scale'.¹ But in 1328 they were for the first time entrusted with judicial functions; for in connexion with the execution of the Statute of Winchester they were authorized to examine and punish evil doers. In 1330 these magistrates may take indictments for trial before the justices of gaol delivery, and persons so indicted may not ordinarily be bailed by the sheriff. It was an important advance in 1344 (18 Edw. III, st. ii, § 2) when these officials were made a permanent staff of royal *custodes pacis*, ready to be appointed 'with other wise and learned in the law' to judicial functions should need arise. Thus these guardians of the peace have become a permanent body endowed on occasion with the duty of judges. Finally, in 1360 (34 Edw. III, c. 1) 'a lord and three or four of the most worthy, together with some learned in the law, were authorized to seize, examine and punish, by common or statute law, or according to their best judgment, all disturbers of the peace; on complaint in the king's name, to hear and determine felonies, or on suspicion to arrest and imprison all dangerous persons, or to take surety for their good behaviour.'

¹ Stephen,
Hist.Crim.
Law, i.
112.

His gradual
supersession of the
Shire
Court.

There were now two bodies existing side by side, the shire court and the justices; and during the next century the powers of the former were gradually transferred to the newer organization. We have seen that all the better members of the shire court had gained exemption from attendance, and that the sheriff's judicial powers had been made over to the Itinerant Justices. The shire court remained for the election of coroners, verderers and knights of the shire; but to the justices sitting in quarter sessions were transferred not only all the *criminal* jurisdiction which remained to the shire court in the fourteenth century, but even the right to hear and determine the Pleas of the Crown, those graver offences of which the sheriff and all other local officers had by Magna Carta been

deprived. Indeed, all crimes and felonies, except treason, were by their commission conferred upon the assembled justices, until Quarter Sessions became a serious rival to the Itinerant Justices or, as they were now called, the Judges of Assize. But after the Tudor times it became customary to reserve cases involving capital offences for the Judges of Assize; although the jurisdiction of Quarter Sessions in such matters was not abrogated until 1842 (5 & 6 Vict. c. 38). Again, although essentially criminal tribunals, Quarter Sessions had originally a limited authority in civil suits, which during the sixteenth century had been increased, until here, too, the power of the justices became practically coordinate with that of the Assizes. This, however, was a weak point, and led to the establishment, in the present century, of the so-called County Courts. But an equally important side of the powers of the general body of justices dealt with local administration. Quarter Sessions became the executive and *administrative* body for the shire. All the old local officials became the servants of the justices and often their nominees. The sheriffs themselves, the constables, and manorial bailiffs were forced to attend their orders and to execute their decrees: the coroner was made answerable to them. Again, they took the place of the sheriff, and their sessions that of the shire court, as the medium of communication between the crown and the people. Thus all letters from the Council were addressed to them, and under the Stuarts they were used as the great agents of government in the demands for purveyance, benevolences, forced loans and shipmoney. They were also the *fiscal* board of the shire, with the duty of assessing, levying, and superintending the expenditure of a county rate. And finally, their general administrative authority touched such important matters as the settlement of wages and of prices, the enforcement of laws against recusants and nonconformists, the maintenance of bridges, roads for the most part, prisons and public buildings of all kinds. Indeed, from the first the justice seems to have assumed the position which has been well described as that of 'the State's man-of-all-work.'

Thus was gradually consolidated that monopoly of the upper class in administration, that local rule of the landed gentry, which foreigners more than native writers have picked out as

irrespective of its object; but it was quite sufficient to raise and maintain a whole army of shameless idlers, whose very existence would cause the deserving poor to suffer in silence rather than to add themselves to so disreputable a crew; while it drew into its ranks all the honest in intention but weak of will who would find it easier to beg than to follow a precarious livelihood.

Early
legislative
attempts to
check it.

For a century and a half the principles of the Act of 1388 were maintained and, in such legislation as took place, merely amplified. On the one side, such Acts as those of 1427 (6 Hen. VI, c. 3) and 1495 (11 Hen. VII, c. 22) merely brought the Statute of Labourers of 1349 up to date by fixing the wages which were to be given to artisans and agricultural labourers respectively. On the other side, another Act of 1495 (11 Hen. VII, c. 2) requires impotent beggars to go to the hundred where they were best known, or had been born, or had last dwelt, and not to beg outside the limits of such district. Finally, in 1531 (22 Hen. VIII, c. 12) the justices are required to assign to the impotent poor an area within which they may beg, while the able-bodied vagrant is to be whipped and sent back to the place where he was born or had last lived for three years, and there he is to put himself to labour. Five years later the futility of these measures caused a change of principle, and the Act of 1536 (27 Hen. VIII, c. 25) attempted to suppress indiscriminate almsgiving and licensed begging by directing the formation of a common fund in each locality, to which alone all voluntary alms should be given, and out of which the impotent should be relieved. It also showed an appreciation of the possible difficulty of the able-bodied in finding work by directing that not only, as in previous Acts, should such be sent to a place upon which they had some kind of claim through birth or a certain residence, but that these alms should also be employed by the local authorities in keeping them to continual labour. Any who still begged were to be punished with degrees of severity varying from a whipping and an incision on the right ear up to a felon's death for the third conviction.

Gradual
consolidation of
the Poor
Laws.

During the next sixty years the law was developed both as regarded the *impotent* and the able-bodied. As regards the former, an Act of 1547, 'the offspring of terror' (1 Edw. VI, c. 3), directs that they shall be forcibly conveyed from

constable to constable until they are brought to the place in which the former Acts required that they should dwell. The attempt of the Act of 1536 to put an end to promiscuous almsgiving was now supplemented by the direction that each curate should exhort his parishioners every Sunday to help in relieving the needy who had a claim upon the parish. The law gradually advanced from exhortation to compulsion. Thus in 1551 (5 and 6 Edw. VI, c. 2) a book was to be kept with the names of householders and of the impotent poor, and two collectors should be annually appointed who, at a certain time, should persuade persons to contribute. Those who proved unwilling should be first exhorted by the minister and churchwardens, and then reasoned with by the bishop. But this was not enough. In 1563 (5 Eliz. c. 3), if the bishop failed, the justices of the peace at Quarter Sessions were to compulsorily assess the recalcitrant householder at his due amount, and to enforce payment by imprisonment; and finally, in 1572 (14 Eliz. c. 5) the justices were to make a direct assessment, and to appoint overseers of the poor who should relieve the minister, churchwardens, and collectors of their responsibility in the matter. The treatment of the *sturdy beggar* was not so satisfactory. By the Act of 1547, such an one refusing to work was to be branded, adjudged the slave of any one who should demand him, and punished with death for a second attempt at flight. Even the impotent person who could do a certain amount of work for his own support and refused to do it, might be punished 'with chaining, beating, or otherwise.' This terrific Act was repealed in the next year so far as regarded the sturdy vagabond. But the Act of 1572, although enjoining that rogues and vagabonds shall be set to work out of the surplus of the collections made for the impotent poor, yet directs that to the idle the same severe punishments should be meted out, ranging from whipping to death, according to the frequency of the offence. In 1576 (18 Eliz. c. 3) a new departure was made in the licence given to the justices to establish Houses of Correction in every county, and to provide a stock of materials on which the unemployed should be set to work. Unfortunately, however, these Houses of Correction seem to have been closed in most parts of England before the end of the century, possibly because the vagabondage with which they

had been intended to deal had, with the increase of employment during Elizabeth's reign, ceased to be a social danger in the same degree as half a century before. The two later Acts of 1597 and 1601 were practically limited to consolidating the provisions of previous Acts. Thus, as regards the *impotent poor*, while the Act of 1597 (39 Eliz. c. 3) merely completed the legislation in favour of compulsory assessment by allowing the distraint of the goods of those who would not pay, the Act of 1601 (43 Eliz. c. 2) merely repeated the provisions of previous Acts with regard to the appointment of overseers by the justices, the provision of a stock to set the poor on work, the binding of children as apprentices, and even the building of houses on the waste for the poor to inhabit. Again, with regard to the *vagabond*, the Act of 1597 (39 Eliz. c. 4, 5) enjoins his punishment by whipping in the first instance, by relegation to the parish on which he has some claim, and finally to the House of Correction or to the common gaol, while dangerous persons were to be disposed of outside the country. This was practically repeated in the Act of 1601, the comprehensive object of which has been described as the desire 'to provide work for those who could work, relief for those who could not, and punishment for those who would not'.¹ The parochial chargeability of the poor had only been gradually recognized. In the earlier Acts the hundred was generally chosen as the responsible unit for relief; but the Act of 1536 imposed a fine on the parish which should not relieve its impotent poor; the Act of 1547 directed the curate to exhort his parishioners to relieve the needy born in the same parish; the Act of 1551 laid the duty of collection and demand upon parochial officers. The Act of 1572 imposed the burden on the jurisdiction of the justices; but the Act of 1597 returned to the parochial limit, which was maintained in the better known Act of 1601.

¹ Cunningham, *Eng. Ind. and Com.* ii. p. 61.

(2) 1601-1834.

Departure from principles of 1601.

It has been generally acknowledged that this last Act lays down the principles on which a sound Poor Law should be administered, and that it was the perversion of these principles, partly from motives of self-interest, partly from mistaken kindness, which led to the disastrous developments of the next two centuries. The steps in this downward course must be briefly noted. In the *first* place, the fear of the wealthier parishes

that they would become chargeable with the needy whose own parishes could not sustain them, caused a stricter definition of this chargeability. The question of 'settlement' had been first dealt with in the Act of 1572, and the justices were directed, if the parishes in which the poor aged and impotent persons were found were unwilling to provide for them, to settle such persons at 'meet places' within their district, and to appoint a weekly sum for their support. But this was far too vague. Until the Act of 1662, say the Commissioners of 1834, 'there seem to have been only two statutory grounds of settlement, birth and residence, first for three years, and afterwards in some cases for one'.¹ This Act (14 Car. II, c. 12) allowed the removal of any stranger within forty days back to his own parish where he had obtained a settlement (which was now defined as a continuous residence of forty days), unless the new comer could give sufficient security that he would never become chargeable to the new parish. A man was thus removed, not because he had fallen into hopeless poverty, but on the chance that some day he might do so. The forty days was further defined by an Act of James II (1 Jac. II, c. 17) as reckoned from the time when the migrant gave notice to the overseer of his residence in the parish. Critics of the Poor Law have been unable to find language strong enough to condemn the laws of settlement. They have been described by one author as consummating the degradation of the labourer by making him a serf without land.² 'The iron of slavery,' says another writer, 'entered into the soul of the English labourer'.³ In fact, though the mischief of which it was the cause may not be underestimated, the system could not work in all its rigour, and certain relaxations were allowed. Thus, by an Act of 1691 (3 Will. & Mary, c. 11), 'derivative settlements' were allowed through payment of taxes for a year, serving an annual office, hiring for a year, and apprenticeship. Again, in 1696 (8 & 9 Will. III, c. 30), a further modification allowed the grant of a certificate of acknowledgment of settlement, under which safeguard the holder of it could migrate to a district where his labour was required, the new parish being assured that he would not become chargeable to it, and therefore not troubling to remove him back until there was absolute need. Finally, in 1795 (36 Geo. III, c. 23), the removal of

The
laws of
settlement.

¹ Report,
p. 84.

² Thorold
Rogers,
*Work and
Wages*,
p. 433.

³ Fowle,
Poor Law,
p. 63.

¹ Report,
p. 85.

persons from any parish was forbidden until they were actually in need of support¹. At the same time, although the law was thus relaxed, the fixed principle which caused the refusal of all permanent relief to labourers who had no settlement in the parish, and also to settled labourers who should reside elsewhere, acted as a very efficient check upon migration. But the derivative modes of obtaining a settlement were retained; and churchwardens and overseers, in their anxiety to prevent the acquirement of such settlements, appealed to the law courts, and spent, in constant litigation, a large portion of the money which should have been devoted to the relief of destitution.

Increased
power of
Justice in
adminis-
tration of
relief.

Nor was this the only fault to be found with the method of expenditure. The Act of 1691 complained that churchwardens and overseers of the poor, by means of their unlimited power and upon frivolous pretences, but chiefly for their own private ends, give relief to what persons and number they think fit, by which means the rates for the poor are daily increased. As a remedy the Act directed the keeping of a register with names and dates, which should be examined annually by the vestry; and that, beyond the persons then allowed, no relief should be given 'except by authority of one justice, or by order of the bench of justices at Quarter Sessions.' The effect of this was practically to *supersede the overseer by the justice* in the granting of relief. The practice arose by which justices ordered relief at their own discretion and without the knowledge of the parish officers. The result was most fatal to the maintenance of the original principles of the poor law. The position of the justices has been described as 'that of charitable gentlemen to whom the oppressed poor could appeal against the tyranny of the overseers².' At the same time, the feeling, faithfully reflected in Parliament, was prevalent, that the State should ensure sufficient subsistence to the working population. At the beginning of George III's reign this led to much legislation in favour of the unrepresented people; but it was not until 1795, and then only in an informal manner, that the principle was embodied in all its naked simplicity. The rise of prices consequent on the French war was bearing so hardly on the poorer classes that the Berkshire magistrates at Speenhamland, near Newbury, declared that further allowances were necessary; and, while recommending farmers to increase their

² Fowle,
p. 79.

labourers' wages in proportion to the price of provisions, and themselves drawing up a scale of relief upon this basis, they promised to grant assistance to every poor family in proportion to its numbers. This *Speenhamland Act of Parliament*, as it came to be called, was speedily imitated in many parts of England. It definitely established the principle of a right to relief independent of work done. It made it more profitable to be idle than to work, and thus increased the rates to so vast an extent that they threatened in some cases to exceed the whole rent of the land, thus throwing it out of cultivation. There were other parallel methods of obtaining relief—no less than six such were discovered by the Commission of 1834—most of which had for their object the employment, whether real or pretended, of the labourers by the farmers and other ratepayers at the expense of the parish¹.

Report,
pp. 8-25.

This whole system of outdoor relief was legalized by the abrogation of the *Workhouse test*. In consequence of a successful experiment, begun twenty-five years before at Bristol and imitated in several large towns, by which workhouses were created and were made a test of destitution, in 1722 (9 Geo. I, c. 7) it was enacted that parishes might unite and provide workhouses, and 'no poor who refused to be lodged or kept in such houses should be entitled to ask or receive parochial relief.' This seems to have met with immediate success; but the humanitarian feelings already noticed contributed to discredit it. In 1782 (22 Geo. III, c. 83) Gilbert's Act, attributing the increased expenditure to the misconduct of the overseers, provided for the voluntary formation of Unions in each of which the workhouse should be supervised by paid guardians under the control of the justices. None but the impotent should go to the workhouse, but suitable employment should be found for the able-bodied near their homes. Sixty-seven Unions were thus formed. This was followed in 1796 (36 Geo. III, c. 23) by the entire abolition of the workhouse test; for in parishes which had not accepted Gilbert's Act the overseers were empowered to give relief in cases of sickness or distress at the applicant's own home, even though the applicant refused to conform to the Act of 1722 and enter the workhouse as a sign of destitution.

The final violation of the Act of 1601 to be noticed was

Law of
bastardy.

concerned with the administration of the *law of bastardy*. An Act of 1572 (18 Eliz. c. 3, § 2) had thought it sufficient, in dealing with this unpleasant subject, to enjoin that, in order that the support of illegitimate children should not defraud the aged and impotent poor of their relief, the justices should place the burden of such a child's support upon its parents. Subsequent legislation made an attempt to punish the parents. Thus, under an Act of James I, the mother was to be imprisoned with hard labour. Two centuries later the sentimental feeling of the time turned the tables on the father, and by two Acts of 1809-10 a woman was actually allowed to fix the fatherhood of her as yet unborn child on any man, who was thereupon imprisoned until he should indemnify the parish against all charges connected with his reputed offspring. The result was most disastrous to morality. The mother could ruin any man against whom she bore a grudge, while she herself not only lived comfortably on the allowance which the supposed father was compelled to make, but was the better off in proportion to the profligacy of her conduct, and was even 'considered a good object of marriage on account of these weekly payments'.¹

¹ Report,
p. 96.

Results of
departure
from prin-
ciples of
1601.

The working of this deteriorated system may be briefly summarized. The overseers, a set of ignorant and unprincipled but local men, who were only in office for short periods varying from two to six months, were entirely overridden by the justices, philanthropic country gentlemen, who generally had no local knowledge, and were not specially interested in keeping down the poor-rate. For the rate was levied on houses and on tithe. It consequently fell most heavily on small householders, such as the independent labourer, and on the tithe-owners, whether clergyman or local landlord. But the pauper could appeal from the overseer to *any* justice, and would consequently choose the weakest or the most charitable within his reach. Since 1795 the justices employed the power given them by the old law of 1562 (5 Eliz. c. 4) to fix what they considered should be the minimum of a labourer's fair wage, and undertook to supplement it in proportion to the number of his family. The farmers being the chief employers of labour welcomed the system, for they either diminished wages to the minimum allowance of the justices, with the

knowledge that it would be made up to their labourers from the rates; or they dismissed their own men in favour of the paupers whom, in accordance with arrangements in vogue in many places, the parish compelled them to employ or at any rate to support. And thus, while the honest labourer was driven out of work, or at best had to accept in the minimum wage a less sum than was paid to the rate-aided pauper, marriages were recklessly made, the pauper going, as it has been said, straight from the church to the overseer, and every encouragement was given not only to incontinence, but to immorality of the most flagrant kind.

Although many suggestions were made, from as early as the middle of the seventeenth century onwards, for remedying the evils which arose from the maladministration or the violation of the Act of 1601, no legislative measure of improvement was passed until early in the present century. In 1819, in accordance with the report of a Committee of the House of Commons, the power of the justices in the direct administration of relief was intercepted by the permissive establishment of *select vestries* which alone could order permanent relief in such places as established them. But their members were drawn from the same class as the overseers; they were irresponsible, and made use of their power to attack the tithe-owners, lowering wages and increasing rates in order to swell the burden upon tithe.

§ 60. One of the first acts of the Reformed Parliament was to subject the whole system of poor relief to the searching investigation of a strong committee, whose report formed the foundation of the *Poor Law Amendment Act of 1834* (4 & 5 Will. IV, c. 76). This Act in its main provisions attempted a reversion to the principle of 1601, and accepted as its motto the duty of the State to provide for its destitute citizens. The organization for this purpose was centred in a board of three Poor Law Commissioners appointed for five years. Their first business was to divide the country into administrative districts. Large towns and extensive and well-populated parishes remained as separate districts; but rural parishes, varying from twenty to thirty in number, were grouped into separate Unions, as these districts were everywhere called. This formation could only proceed slowly, partly because

The
modern
Poor Law.

Parliament refused to allow the voluntary Unions, formed under Gilbert's Act of 1782, to be dissolved except with their consent, and their continued existence much interfered with the new grouping of many districts; partly because each Union was to support a so-called Workhouse, and these buildings took time to erect. England is now divided into about 650 Unions, the division having been made without any regard to previous areas of local government and inaugurating a confusion in local administration which has only been slightly removed by the Act for the establishment of County Councils in 1889. The Central Board appoints Assistant Commissioners (who, since 1847, have been called Inspectors) and audits the accounts of each Union. The Unions themselves are administered by Boards of Guardians, unpaid officials elected by the ratepayers of each parish in number according to the size of the parish. But each parish while contributing, not according to its rateable value but according to its expenditure in poor relief, to a common fund for the maintenance of the officers and workhouse of the Union, retained the chargeability for its own poor. The workhouse was intended as a test of destitution, and owed its name to the intention of the framers of the Act, that it should be used for setting able-bodied paupers to work in the manner provided by the Statute of 1601. For, outdoor relief was to be gradually abolished; and ten years after this Act a final order was issued that 'every able-bodied person . . . requiring relief . . . shall be relieved only in the workhouse of the Union.' The aged and impotent alone were exempted from the operation of this rule.

Its develop-
ment. This is not the place to praise or censure a departure from the principles laid down in 1834; but of the fact of such a departure there can be no doubt. It will be enough here merely to chronicle the changes in administration or practice that have taken place in the last sixty years. In the *first* place, the Poor Law Commissioners at the expiration of their five years successfully defended themselves against a host of malicious attacks; and, after having had their powers annually renewed from 1839 to 1842, they were further reappointed for five years. Hitherto the Commissioners had been independent of Parliament; but now that the reforms had been

carried through, it was thought better to make them into a ministerial department. Accordingly, in 1847, a Poor Law Board was formed, consisting of a number of great officials of State headed by a President with whom the whole work of the Board really lay. The desire to bring the Poor Law administration more into connexion with local government caused the Board, in 1871, to be merged in the newly constituted and more extensive Local Government Board. In the *second* place, a series of statutes from 1846 to 1865 transferred the chargeability of the poor from the parish to the Union, and substituted a short residence of a year for all other methods of obtaining a settlement and so a claim for relief upon the Unions. In the *third* place, outdoor relief, instead of becoming extinguished, largely exceeds in the number of its recipients the use of the workhouse as a limit and test of destitution. It is round this question of the advisability of outdoor relief that the battle between Poor Law reformers and philanthropists chiefly rages. The relaxation in the original intention of the Act on this point has been the result of two exceptions allowed by the Commissioners. Outdoor relief might be granted in the case of either the aged, who were defined as over sixty years; or, by a subsequent order, the able-bodied who, through special circumstances affecting themselves or their families, were unable to work. The latter class of cases rested entirely on the discretion of the guardians. Owing to the irregularity of their attendance, the administration of the Poor Law in this respect—the sole point in which the initiative is left to the local bodies—is most capricious. Not only do Unions differ in the amount of outdoor relief allowed, but in the same Union, on successive days of meeting, two sets of guardians may attend imbued with diametrically opposite opinions on the advisability of outdoor relief. In any case, the way of escape allowed by the Central Board out of the rigid interpretation of the Act of 1834 has been seized upon by the guardians; and the recipients of outdoor relief steadily grew until their numbers were six times as great as those of the inmates of the houses. Considerable pressure from the Central Board has since reduced the proportion to three to one; but the question is still a long way from solution, and there is a tendency among a class of politicians to

gain popularity by advocating a large scheme of outdoor relief. One result of the system has been to increase the expense of the relief administered in the workhouses, which, originally built on a large scale, are now half tenanted, and yet are obliged to maintain a staff suitable to the size and possible requirements of the building. *Finally*, the original intention of the workhouses has been completely lost sight of, and they have become the permanent abode of the thriftless and the unfortunate, and the temporary accommodation of the tramp. In fact the two points upon which all critics of the Poor Law would be agreed, are the want of moral classification among the inmates of a workhouse, the absence of which allows the unfortunate to be contaminated by contact with the thriftless; and its total inability to deal with the 'casual pauper' who remains, as he has been described, king of the situation, doing no work, subsisting upon mistaken private charity and only taking refuge in the workhouse when driven by absolute need.

New areas
of local
administra-
tion.

The division of the country into Unions by the Act of 1834 formed a bad precedent for the extension of local government to other purposes. Although for the purposes of the Education Act of 1871 the parish was chosen on the whole as the unit, and although for sanitary purposes by the Act of 1872 the Union is the common area of administration and the Board of Guardians the sanitary authority; yet in the course of the century there were formed Highway Boards and Burial Boards, which might or might not correspond with any existing local area. Much of this confusion has been removed by the creation of County Councils in 1889, of which there are sixty for administrative counties and sixty-two for county boroughs mostly with a population of over 50,000. To these bodies are entrusted powers taken partly from Quarter Sessions, partly from the highway and sanitary authorities. The system of local government has been completed in the present year (1894) by its extension to the smaller area of the parish.

✓ § 61. It remains to speak of the BOROUGH. This is the outgrowth of the conflict of three principles—namely, those which may be said to be expressed in the Burh- or Port-Moot of early English days, the Court Leet and the Merchant Gild. (1) The

earliest of these was the *Port Moot*. In its origin the burh was merely a populous township, whose extra inhabitants were due either to the presence of the shrine of a hero or a saint which formed a convenient meeting-place and market, or to the shelter afforded by a monastery or a castle, or to its position at the crossing of high roads or the ford of rivers, in which cases it would often result from the gradual coalescence of several contiguous villages.

Origin of self-government in the boroughs.

The burh would thus consist of several townships or parishes, each of which would enjoy its own separate organization. But above these there would be a general organization resembling that of the hundred, for a burh court for all was held thrice a year under a reeve whether a wic-, tun-, or of a mercantile centre, a port-reeve. Like the rest of the shire, the burh was under the sheriff, who would exact money from it, and either himself preside or send a representative to the burh-moot. So far, however, the burh was little more than an enclosed township, and its life was almost entirely agricultural. But (2) this agricultural organization would soon give way to one founded on some kind of privilege. In short, the distinctions and principles of feudalism would creep into the borough organization. Thus a large number of burhs which had grown up on the land of churches or thegns, would from the first be dependent on a lord. In some of these the jurisdiction became curiously divided, as, for example, in Chester, which at the Conquest was shared between the king, the bishop, and the earl¹. In such cases the wealthier tenants would make themselves responsible to the sheriff for that part of the ferm of the shire which, as due from them, was known in future as the ferm of the borough (*firma burgi*). In return they were recognized as the governing body of the borough; they were the holders of the *burgage* tenure which corresponded to the socage of the country; and, in shutting out the sheriff's jurisdiction, they wielded those criminal and police powers which, whatever was the name of their court at first, afterwards came to be associated with the grant of a *Court Leet*. (3) The third, and ultimately the most important, factor in the formation of the boroughs was the organization of the *Merchant Gild*. A gild appears to have been at first a religious and social union; but owing to the action of the government these

¹ *Sel. Chart.* p. 87.

were superseded by the frith-gild, an alliance for mutual protection, which was begun perhaps in this form among the foreign residents in seaport towns and, with the relaxation of the old family bonds, was extended all over England. Moreover, as it was trade that brought foreigners to the country, many of these early associations for mutual protection and responsibility would also take the form of merchant gilds; while, as trade increased, in days when every trader, however humble, was a merchant, the influence of these gilds would spread abroad.

Before the Conquest these three principles, the agricultural, the feudal, and the commercial, were all represented in the larger burhs; but the first was quickly disappearing beneath the other two, which were shortly to contend for mastery. The Norman Conquest affected the towns in three important ways. (1) The boroughs were all regarded as in some lord's demesne. This placed the burgesses—the holders of the burgage tenure, the members of the local court—in the semi-dependent position of villan tenants, and was soon made to carry with it, over and above the annual firma burgi, an occasional payment known as Tallage, which might be exacted by every lord from the towns in his demesne. (2) At the same time, the few existing towns suffered severely; for the civic population recorded in Domesday fell from 17,000 to 7,000. This was due to the long resistance which the Danish portion of the population is said to have offered, and to the clearances made by William in order to obtain sites for castles for military purposes. And yet this diminished number of burgesses was made responsible for the same firma burgi. (3) To crown their misfortunes, although a law of the Conqueror made all Frenchmen settled in England in the days of King Edward to be at scot and lot (i. e. to take their share in local taxation) with the other inhabitants according to the law of England; yet this very distinction seems to imply that the very much greater number of foreign artisans who followed in the wake of the Conquest itself, occupied an exceptional position.

Efforts for Self-government. The efforts of the towns in the direction of self-government had for their first object the acquisition of freedom from the judicial and financial control of the sheriff, and their success is recorded in the charters which they won from the kings

or their lords. These may be dealt with in two groups. The first comprise those charters granted by the Norman kings. Of these Henry I's grant to London¹ is as much more important as it is in advance of any other in the privileges won. The first object of all towns was the definite settlement of their firma; and some, such as Chester², had gained this even before the Conquest. This in itself had a threefold object and result—to get rid of the interference and arbitrary assessment of the sheriff; to shake off the theory of villenage, for the customs of Newcastle show an established distinction between a burgess and a villan³; and in some cases to make the merchant gild the governing body of the town, since its members generally bought the ferm. After the settlement of the ferm, London gained the election of its own sheriff and justiciar. This was far in advance of anything yet gained by other towns, and its object was not only that citizens might be amenable to the jurisdiction of their own courts and magistrates alone, but, in the case of London, that even pleas of the crown, which were in an ordinary case specially exempted, might be tried by its court. The next privilege was the maintenance of old customs as against such royal claims as were expressed by the terms *schot and loth* and *Danegeld* and the hated Norman innovations of the *murdrum*, which became presentment of Englishry, and the *duellum* or trial by battle. This last appears also in the practically contemporary customs of Newcastle-upon-Tyne⁴. Lastly, while other towns, such as York and Beverley⁵, gained freedom from tolls throughout their respective shires, to London alone was it granted that such freedom should include the whole of England.

The charters granted to towns by the Norman kings call for two general remarks. In the first place, the London Charter became a model to smaller towns for some time to come. Thus the charters of Richard I to Winchester and to Lincoln⁶, and that to Northampton⁷ under John will be found practically to correspond in the detailed privileges granted, with those which London gained from Henry I. And, secondly, it is clear that, in a smaller way, the charters of certain towns became a model for the other towns in their district. Thus the Archbishop of York grants to Beverley the same privileges as the citizens of York already possess;

¹ *Sel. Chart.*

p. 108.

(1) Under the Normans, 1066-1154.

² *Ibid.*

p. 88.

³ *Ibid.*

p. 112.

⁴ *Ibid.*

p. 111.

⁵ *Ibid.*

p. 110.

⁶ *Ibid.*

pp. 265-6.

⁷ *Ibid.*

p. 310.

¹ *Sel. Chart.* p. 313. the burgesses of Hartlepool¹ gain from John the liberties and laws enjoyed by Newcastle: while the same king grants to Helston¹ the liberties and customs of Launceston.

(2) Under the early Plantagenets, 1154-1191. Under the early Plantagenet kings the charters to towns grow far more frequent and full. They contain, to begin with, a grant of those privileges, often much extended, which London had already obtained—the settlement of their firma; the election of their own officers together with (though this point is not yet generally conceded) special provision for pleas of the crown; the maintenance of old customs and rights such as sac and soc, toll, team and infangenthef—franchises inherited by the feudal lords from the private jurisdictions of the thegns—together with freedom from the innovations of the murdrum and duellum, and from various kinds of fines of which many were the mark of villan tenure; and finally, freedom from tolls, not only over England, but throughout the king's dominions generally: and with this was generally combined the power of reprisal for any tolls unjustly levied. But beyond these there are two most important and practically new developments. Already in the customs of Newcastle² it was recognized that membership of the town for a year and a day conferred freedom for the future on the hitherto unreclaimed villan. But from the time of Henry II this power of enfranchisement became a regular grant, as to Lincoln and Nottingham³, and came to form part of the law of the land. It was conducted chiefly through the medium of the merchant gild⁴, the grant of which became an equally common feature in the charters. The gild seems also to have rapidly monopolized the government of the towns. For instance, the charters of both Henry II⁵ and Richard I to Winchester are granted to 'my citizens of Winchester of the Merchant Gild'; and, while Henry II in his charter to Lincoln grants a merchant gild, the charter of Richard I makes no mention of the gild, but grants to the citizens freedom from tolls throughout England, which seems to point to the identity of the governing body of the citizens with the merchant gild. This is confirmed by many charters of John's reign which unite in the grant the gild, the hansa (whatever the exact distinction may have been), and freedom from all kinds of toll.

The merchant gild had a twofold object, the one exclusive—

to get for the gild brethren a monopoly of trade in the town and the privilege of trading in other towns; the other inclusive — to let all within the gild share in all advantages of trade, and to secure help for its members in sickness or misfortune. Thus the inducements to join the gild would be the possession of a commercial status which membership with such a body would give, the possibility of procuring better terms of foreign trade by combination, and, finally, the coercion to join which would be placed on all outside the gild. With regard to the membership of the gild, it is important to note that (1) not all in the town would belong, not even at first all the burgesses; while in many towns there were classes like the Jews and Flemish weavers who held their privileges by direct grant from the crown, and would thus claim to be independent of the gild. Again (2) in some towns there were members of the gild who were not burgesses, such, for example, as burgesses of other towns and sometimes even neighbouring monasteries and lords of manors. At the same time, even within the towns, membership of the gild must have been fairly comprehensive, so as to include men in a very humble way of business; for, while the towns were mainly agricultural, not only was the gild widely spread (we know of 150 towns which obtained the privilege in the twelfth and thirteenth centuries), but it contained, even in the small town of Totnes, as many as 200 members.

But even with the victory of the merchant gild the struggle for self-government was by no means over. (1) The sheriff still retained a hold upon the towns; for, fiscally, the collection of the tallage was still in his hands¹. Judicially the borough appeared by its twelve legal men to meet the royal judges in the shire court²; and in military matters he saw that citizens and burgesses among others had been sworn to arms³, and he summoned them all, when necessary, to the field⁴. (2) Even more important, it was still maintained in theory that all towns were in some lord's demesne. This had two important corollaries. It justified the lord in his demand for tallage, from which the fixed payment of the firma burgi or commutation, which was the mark of a free tenant, should have saved the burgesses. By the thirteenth century a small limitation to the general right had been established, for it was understood that a lord's tallage required the royal leave. The king, however,

The
Merchant
Gild.

Continued
power of
the Sheriff.
¹ *Sel. Chart.*
p. 444;
Matt.
Westm.,
430.
² *Ibid.*
p. 358.
³ *Ibid.*
p. 371.
⁴ *Ibid.*
p. 359.

Tallage.

did not, as Henry III's action proved, hesitate to take it frequently; and the right was, as we have seen, not limited by the *Confirmatio Cartarum* in 1297, and not abolished till the Statute of 1340. As a second result, it seemed likely at one time that only towns in ancient demesne would win representation in Parliament; for, in their anxiety to escape from the obligation of attendance at Westminster, many of the towns pretended that the presence of borough members was only for the easier exaction of the tallage, and that therefore only those should come which were entitled to pay that tax. Fortunately this contention was entirely defeated. But most important of all in its hindrance to real self-government, was '3) the tendency to exclusiveness that grew up within the towns themselves.

Aristocratic
exclusiveness.

The burgesses, having bought their privileges, were most jealous for their maintenance against all outside encroachments, whether of local magnates, foreign artisans, or unfree dwellers in the same town. Thus, even the supreme victory in municipal self-government, the grant of a *Communa* of mayor, aldermen, and common council was an aristocratic victory. London gained it first in 1191, whence it rapidly spread throughout the country in the following reigns.

The Craft
Gilds.

§ 62. But almost immediately the quarrels begin. In 1196 William Fitz-Osbert, on behalf of the poorer citizens, complained that they were made to bear an undue portion of the burden of the taxes: but the riot which he led only ended in his death. This was but a foretaste of the quarrels which arose soon after from the relations between the merchant and the craft gilds. The latter were associations of all artisans who were engaged in a particular industry in a particular town. They came into existence a century later than the merchant gilds, that is, in a few cases in the twelfth century; but in the following century they were to be found in all branches of manufacture, and in every industrial centre. They were first formed, perhaps, like the merchant gilds, by foreigners, chiefly weavers, of whom a great stream came after the Conquest from Flanders under the protection of Queen Matilda. For this reason, no doubt, even when the craft had spread to the native English, weavers were for long excluded from any position in the towns, and craft gilds were regarded with suspicion. Those which were formed without buying the royal sanction (adulterine gilds, as they

were called) were heavily fined, though not necessarily suppressed. A century later, under Edward I, these organizations were encouraged as a counterpoise to the rising oligarchy in the towns. In many cases that oligarchy was coterminous with the merchant gild, and an important question arises as to the connexion of the merchant and craft gilds. We are met by two entirely opposite views. On the one side it is held¹ that the craft gilds were formed in self-defence out of the landless, and consequently citizenless, artisans to resist the oppression of the merchant gild, armed as it now was with the powers of a municipality. On the other side it is urged that civic quarrels were not, as such a view would imply, between capital and labour, but between burgess and alien². Few towns would possess a sufficient number of merchants to form an organization of wealth for the oppression of the craftsmen. Moreover, the regulations of the crafts insist on good work, and there is little in them that would protect the members from outside oppression, while the approval of the town magistrates was needed for their recognition and enforcement. Thus it seems more likely that craft gilds were formed with the approval and encouragement of the magistrates for the regulation of industry in particular branches. But whichever of these, if either, may have been the origin of the craft gilds, by the end of Edward III's reign citizenship came to be bound up with membership in one of the crafts, until the decline of the gilds at the end of the sixteenth century. It has been usual to believe that a statute of 1545, which was re-enacted and enforced in 1547, confiscated to the king the property of the gilds on the plea that a great portion of their wealth was spent in superstitious uses, and that thus at one sweep disappeared 'the benefit societies of the Middle Ages'. It has, on the other hand, been shown that the intention of the Statutes of 1545 and 1547 was very different and that the sole result of the latter, which alone took effect, was to vest in the king as rentcharges all sums of money hitherto devoted to the maintenance of any religious service or establishment; that the gilds were close corporations whose funds benefited few besides the families of the members; that there is mention of several gilds and recognition by statute of their officers for the discharge of public duties in the reign of Elizabeth, and that the practical dis-

¹ By Professor Ashley and, more cautiously, by Dr. Stubbs.

² Their relation to the Merchant Gild.

³ Drs. Cunningham and Gross.

Causes of their decline.

⁴ Thorold Rogers, *Work and Wages*, p. 346; *Econ. Interp. of Hist.* p. 367; and Cunningham, *Eng. Ind. and Com.* i. 465.

appearance of the gilds was due to economic causes, such as the introduction of new industries and the spread of the 'domestic' system of manufacture. The London gilds, which were treated in no respect differently to the rest, have alone survived, not because they were too rich to be touched, but because they were more than gilds of artisans, that is, they were wealthy corporations whose civic duties survived the disuse of those economic functions for the discharge of which they had been called into existence¹.

¹ Ashley, *Econ. Hist.* vol. i. Pt. ii. pp. 139-155.

Growth of oligarchy in the towns.

There seems sufficient proof that at its first establishment local self-government was founded on a democratic basis. Evidence drawn from such unconnected places as Hereford, Ipswich, and Beverley seems to show that citizenship could be easily obtained and that the bailiff or other local magistrate was elected by the whole community. The great change which did away with this popular government was due partly to the growing inequalities of wealth, partly to that important feature of the Middle Ages—the disinclination for duties of any sort unless they were accompanied by some manifest advantage. Thus we find in the fourteenth century equally, for example, in Scarborough and in King's Lynn, a recognized distinction between the rich, the middle class, and the poor (*divites* or *potentiores*, *mediocres*, *pauperes* or *inferiores*); and thus, following the example of London, already noted, complaints are found at Stamford (1260), Gloucester (1290), and Oxford (1293) of the unjust taxation of the poor by the rich. In short, it must be owned that 'the few well-to-do persons of the community who aspired to fill public positions were not prompted by any love of fame or glory. They had in mind a far more practical and unworthy end—namely, to manipulate the financial system of the borough in such ways as to promote their own interests by putting burdens on other people's shoulders².' But this was only the beginning of the end.

² C. W. Colby, in *Eng. Hist. Rev.* vol. v. p. 645.

The oppressions and usurpations of the richer citizens did not pass without protest from their poorer fellows. Sometimes an appeal was made to the Courts of Common Law, sometimes resort was had to arbitration, while occasionally, as at Bristol in 1317, a serious popular outbreak was the result. But on the whole the indifference and poverty of the mass of citizens gradually gave the vic
Thus it early

became the custom for convenience sake that a body of twelve or twenty-four should be annually elected as a committee of the whole community of citizens. Now, in the case of Winchester, early in the reign of Edward I, the two bailiffs who existed side by side with the mayor were elected, one by the committee, the other by the general body of the people. A century and a half later, under Henry VI, the committee had practically usurped the nomination of both officials, leaving to the general body of citizens the empty right of confirmation. It only needed the grant of charters of incorporation from the crown to legalize the custom and confirm the power to the oligarchy which had usurped it. A few towns had obtained by Act of Parliament a recognition of their local customs, but Henry VI began the easier and more common form of royal charter for this purpose. Thus at Leicester, in 1464, Edward IV recognized a body of twenty-four mayor's brethren and a common council of twice that number. Three years afterwards this latter body obtained the election of the mayor. In 1484 the former committee became aldermen and divided the town into twelve wards, merely for police purposes; while in 1489 the mayor, the brethren, and the common council formed themselves into a close corporation, and their position was assured to them both by Act of Parliament and by royal charter.

In Exeter, again, the *commune concilium* of the city, which had once consisted of the whole body of the freemen—the *tota villata* as it is elsewhere described—was narrowed down to a body of twenty-four, in whose hands were placed successively the election of the aldermen (1288) and of the mayor (1347). During the century and a half that followed, this narrow committee was transforming itself into a permanent self-elected body until the charter of 1497 practically confirmed the privileges which they had accroached to themselves. The charter of Charles I (1627) only added to their powers. But in Exeter, unlike the majority of corporate towns, the election of members of Parliament never fell into the hands of this exclusive corporation. It remained with the whole body of freemen.

The last development in municipal government which calls for notice was the constitution of some of the largest towns as

¹ Stubbs,
Const.
Hist. iii.
§ 488.
Boroughs
made into
Shires.

² Maitland,
Justice
and Police.
p. 71 note.

counties, with sheriffs and a shire jurisdiction of their own¹. This involved the final banishment of the sheriff of the shire from interference in their concerns. Henry I's charter had already given this privilege to London; but not for more than 200 years did any other town attain it. Edward III gave it to Bristol in 1373, Richard II to York in 1397. In the fifteenth century it became more common, and, finally, about eighteen towns procured the privilege, the majority of whom retain it to the present day². Such were the corporations which formed the strongholds of the Whigs when that party came into existence, and which, on that account, were attacked successively by Charles II and his brother James II. The details do not concern us here, for there was no alteration in the structure of the corporations, and none, except temporarily, in the class of persons of whom they were composed. It was not until the Reform Parliament that any change was made, and the Municipal Corporations Act of 1835 'provided a uniform constitution for all boroughs to which it applied, based on the model of the best municipal corporations.' This consisted of a council composed of the mayor, aldermen, and common councillors. The councillors are elected for three years, a third retiring annually, by all ratepaying residents of either sex, and their number is fixed at the time of incorporation. The aldermen are in number one third of that of the councillors, by whom they are appointed for six years, one half retiring triennially by rotation. The mayor is elected annually by the council from among the aldermen or councillors.

The judicial constitution of boroughs varies greatly. The Act of 1835 did away with the judicial authority of the aldermen and with the elected justices of the peace. In their place in every borough there were naturally two justices of the peace, the Mayor and ex-Mayor. But besides that, most boroughs of any size have a separate commission of the peace, which includes the county justices, together with some additional justices of their own. Further, it is possible for a borough to have a court of Quarter Sessions under a trained lawyer called a Recorder, and a Stipendiary Magistrate for a practically similar purpose. The whole judicial organization of the town is subject to the supervisory control of the High Court of Justice.

CHAPTER IX.

LIBERTY OF THE SUBJECT.

§ 63. THE freedom of the individual is the peculiar boast of the English people. The citizens of other nations share with us an equality of political privileges ; but few possess in the same degree that immunity from petty official tyranny which has hitherto made daily life in England freer than perhaps anywhere else in the civilized world. To the subjects of many European governments this personal liberty is guaranteed by an article of the written constitution under which they live. But the English constitution rests on no such written basis ; and consequently this right, 'which consists in the power of locomotion, of changing situation, of moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law'¹, *exists nowhere in English law as a stated principle*, except perhaps in a well-known article of the Great Charter. In other words, it is *secured indirectly*, 'by the strict maintenance of the principle that no man can be arrested or imprisoned except . . . under some legal warrant or authority, and . . . by the provision of adequate legal means for the enforcement of this principle'². It is not, however, to be supposed that mediaeval England, except perhaps in degree, was more exempt than other nations from that 'ferocity of the times and the occasional despotism of jealous or usurping princes' (Stephen) which overrode all securities for liberty and, in too many countries, made government only another name for systematic oppression. A contempt for even the legal rights of individuals is no uncommon mark of that kind of rule by a despot

Personal
liberty.

¹ Stephen's
Commentaries
(11th ed.),
i. 149.

² Dicey,
Law of
Const.
p. 195.

or a privileged class, which was most prevalent in the Middle Ages. Kings, nobles, and even Parliament, when it took upon itself judicial functions, only too frequently sacrificed the claims of individual right to their own interests or desires. And yet in England at least the means of securing this individual liberty of the freeman were coeval with the Common Law. How it was secured in Anglo-Saxon times, except as against actual enslavement, is not very clear; but with the introduction at the Norman Conquest, if not just before, of the system of procedure by writs, methods of redress against unlawful detention were abundantly provided. No less than four such writs seem to have been framed. The first was (a) the writ *de odio et atia*, which directed the Sheriff to inquire whether a prisoner accused of murder was committed upon reasonable suspicion or only *propter odium et atiam*, i. e. through malice; in order that in the latter case he might be admitted to bail, and so await his trial at the hands of the king's justices on their next Iter. But this writ was only issuable through royal favour, and advantage of this was taken by John to demand large sums of money for the privilege. Magna Carta (§ 36) provides that this, which it calls 'the writ of inquest of life or limb,' shall be given free without power of refusal. The application of the writ was restricted by the Statute of Gloucester (6 Edw. I, 1278), but the Statute of Westminster II (13 Edw. I, 1285) again removed all power of denial. It was abolished in 1354; 'but,' says Blackstone, 'as the Statute 42 Edw. III repealed all the statutes then in being, contrary to the Great Charter, Sir Edward Coke is of opinion that the writ *de odio et atia* was thereby revived.' (b) The writ of *mainprise* or *manu captio* commanded the sheriff to take sureties, called *mainperners*, for the appearance of the prisoner and to set him at liberty; while (c) the writ *de homine replegiando* bade the same official to replevy or repledge, i. e. deliver a prisoner from custody 'in the same manner that chattels taken in distress may be replevied,' on bail being given for his subsequent appearance.

But all these remedies fell into disuse or were superseded by the still existing (d) writ of *HABEAS CORPUS*. Of this there seem to have been no less than five variations, the chief of which was the *Habeas Corpus ad subiiciendum*. This form of

Secured by
issue of
writs.

Writ of
Habeas
Corpus;

the writ is not of privilege, but of right, existing at Common Law; and, therefore, cannot ordinarily be withheld. Originally it might be demanded from the Court of King's Bench by any prisoner or his friends, and could be addressed to any person, whether an authorized gaoler or not, who detained another person in custody, commanding such detainer 'to produce the body of the prisoner with the day and cause of his caption and detention, to do, submit to, and receive, whatsoever the judge or court awarding such writ shall direct.' But despite the apparent simplicity of the means for ensuring a prisoner against wrongful or arbitrarily prolonged detention, it was many centuries before the full and efficient working of the writ was finally secured. In the first place, the writ as being of right could not ordinarily be withheld by a judge on a statement of a prisoner's case by himself or his friends; but Sir Edward Coke, when Chief Justice in 1616, denied it to a man imprisoned for piracy, whose own statement seemed to establish the truth of the charge against him. But there was a much more important class of cases which threatened to annihilate altogether the action of the writ. The deeds or misdeeds of an English official, whether Prime Minister or parish constable, are amenable to the ordinary law of the land, tried in the ordinary courts; and the plea of official duty affords no excuse for the performance of an otherwise illegal act. But in France and many other nations of the European continent, members of the administration are protected in the discharge of their official duties by a particular law administered by special courts, which legalizes acts unlawful if done by a private person. The disadvantages of the English system in enabling the government by prompt action to check at its beginning a threatened disturbance of public order, have often been pointed out. Here it is necessary to notice that the English government has not always acquiesced in this interpretation of the law. The strong executive of the Tudors and early Stuarts was based upon a theory of the law similar to that of the French *droit administratif*¹. The Stuart theory, upheld by the decision of the judges, as to the extraordinary power of the prerogative, or in other words, the discretionary power of the Crown, claimed among others the power of committing individuals to prison and retaining them

how
evaded.

¹ Dicey,
*Law of
Const.* pp.
326-9.

there without allowing the necessity of any further return to a writ of Habeas Corpus by the gaoler than that the prisoner was retained by special command of the king, *per speciale mandatum regis*. But this claim to a power of practically indefinite imprisonment was contrary not only to the spirit of Magna Carta which provided (§ 39) that no free man should be taken or imprisoned or otherwise penally dealt with unless by lawful judgment of his peers or by the law of the land; but also to the letter of a more explicit Statute of 1351-2 (25 Edw. III st. 5, c. 4) which, aiming directly at the exercise of extraordinary powers by the Privy Council, enacted that no one should be taken by petition or suggestion to the king unless it be by indictment or presentment or by writ original at the Common Law. The exercise of this power of commitment even by a single councillor, led to a formal complaint from the judges in 1591 addressed to the Chancellor, Sir Christopher Hatton, and the Treasurer, Lord Burleigh; which, however, while enumerating examples of illegal commitments, acknowledges that a committal 'by Her Majesty's special commandment, or by order from the Council board, or for treason touching Her Majesty's person,' is sufficient return to a writ of Habeas Corpus. It is clear, however, that the judges in this acknowledgment of the power of the Council, were only contemplating the alternative of bailing a prisoner or of remanding him back to prison. But the Council did not hesitate to use this power in a way that amounted to an entire refusal of trial to a prisoner committed *per speciale mandatum regis*. The admission of Chief Justice Anderson and his fellow judges in 1591 was used to justify the decision of the judges in the celebrated case of *Darnell* in 1627. A number of persons had been imprisoned by the Privy Council for refusal to contribute to a forced loan: five of them applied to the Court of King's Bench for a writ of Habeas Corpus; the gaoler made the return that they were confined *per speciale mandatum regis*, and the case of one of the plaintiffs, named *Darnell*, was argued out before the assembled judges. The plaintiff's counsel did not deny the right of the Council to commit to prison; but they asserted that the cause of commitment must be named in the warrant in order that the Court might decide whether the charge was one in which bail was allowed or not;

whereas the prisoner had merely been committed at the special command of the king. It was defended by the Attorney General on the ground that reasons of state might make a definite charge inexpedient in political cases. This, however, had nothing to do with the case. It was well known that the real cause of imprisonment was not the necessity of collecting scattered evidence of some deep conspiracy, but the refusal of the prisoners to contribute to a loan the levy of which they regarded as illegal and the legality of which the king dared not put to the test before the common-law courts. This the judges sufficiently recognized; for, while giving the case for the Crown, they refused to leave on record the assertion that the king need not specify the cause of commitment. As a direct answer to this decision the Petition of Right in the very next year, rehearsing that in violation of Magna Carta and of the Statute 25 Edw. III certain of the king's subjects had been detained by the king's special command alone, at the same time prayed that for the future no such imprisonment should be allowed. Yet this very definite prohibition did not prevent the committal, in the very next year, of Sir John Eliot, Selden, and others, at the special command of the king, on the general charge of 'notable contempts and stirring up sedition against the king and government'; nor did it even prevent the judges from delaying to find it bailable and thereby prolonging the imprisonment for two terms and a long vacation. Finally, the Statute of the Long Parliament which abolished the Star Chamber (16 Car. I, c. 10, 1641) provided that every one committed by the king himself or by the Council collectively or individually, could claim from the King's Bench or Common Pleas without any delay upon any pretence whatsoever, a writ of Habeas Corpus; and that within three days the Court should determine upon the legality of the commitment and act accordingly.

But if a direct refusal of the writ even to important prisoners of state, was thus forbidden, there were many ways which had always existed, of evading the action of the writ. Early attempts of the Commons under Charles II to remedy some of these defects failed through the opposition of the Lords; but matters were brought to a head by the case of *Jenkes*, a London citizen committed by the king in Council for what

Habeas
Corpus
Act.

the government chose to interpret as a seditious speech at the Guildhall. So many difficulties were thrown in the way, including the refusal of the Lord Chancellor and the Lord Chief Justice to grant a writ in vacation, that it was many weeks before the prisoner was finally released on bail. Three years later the efforts of Lord Shaftesbury procured the passing of the *Habeas Corpus Act* (31 Car. II, c. 2, 1679) which embodied in a statute the right hitherto based but imperfectly upon Common Law, and remedied some of the most important defects in the administration of that law. Thus (1) although, as we have seen, no excuse practically justified a judge in refusing a writ, the detainer, whether a lawful gaoler or not, was not bound to produce his prisoner until a second (called *alias*) and even a third writ (called *pluries*) had been issued. The statute enacted as a remedy that every prisoner on a criminal charge, except one of treason or felony, could obtain a writ, and must be brought up within at most twenty days of its issue; while no person once delivered by *habeas corpus* shall be recommitted for the same offence. This was enforced by heavy penalties both from gaoler and judge. But further, since a person charged with treason or felony would still be left at the mercy of the judge who had no right to inquire into the truth of the charge made against him, a subsequent clause of the statute provided that every prisoner on such charge must be tried at the next gaol delivery or else released on bail unless the witnesses for the crown could not be produced in time; while, in any case, after the second gaol delivery he could, if still untried, claim his discharge. A second grave defect in the working of the writ had been made clear in the late case of *Jenkes*. (2) No court, except the King's Bench, was accustomed to issue these writs, and it was a question whether during vacation, which comprised a large portion of the year, they could be issued at all. The statute met this difficulty by providing that all the chief law courts might issue the writs; while in vacation a single judge of any such court was armed with the same authority. (3) A third set of provisions was aimed against a custom which had become common under Lord Clarendon, though not unknown to his predecessors, of transporting prisoners to the Channel Islands or elsewhere out of the operation of the law. The

Statute forbade, except under certain specified circumstances, the transference of a prisoner to Scotland, Ireland, Jersey, Guernsey, Tangiers or any place beyond the seas; while it provided that the writ should run in the counties palatine, cinque ports and other privileged places.

But this Act was, with all its merits, far from conclusive. Indeed, the history of the Habeas Corpus Acts has been instanced as an apt illustration of 'the predominant attention paid under the English Constitution to *remedies*, that is, to modes of procedure . . . by which to turn a merely nominal into an effective or real right¹.' For 'they are intended . . .¹ Dickey simply to meet actual and experienced difficulties'; and consequently, it is not to be wondered at that a century and a half elapsed before the machinery for securing protection against unlawful imprisonment was finally perfected. Thus (a) the Act of 1679 fixed no limit to the amount of bail that might be demanded. This was remedied by the clause of the Bill of Rights in 1689, which declared that 'excessive bail ought not to be required,' the precise amount being left to the discretion and honourable motives of the judge on a review of the charge and the rank of the prisoner. More lasting defects were (b) the application of the writ merely to commitments on criminal charges, and (c) the absence of any provision against the allegation of a false charge or, as it was technically called, a false return, by the gaoler. These were corrected by Statute 56 Geo. III, c. 100 (1816), which extended the action of the writ to non-criminal charges, and authorized the judges to examine into the truth of the facts alleged in the return to the writ with a view to bailing, remanding, or even discharging the prisoner accordingly. It should be noticed, in conclusion, that by a subsequent Act (25 & 26 Vict., c. 20) the action of the writ outside England has been limited to those colonies or foreign dependencies of the Crown whose courts have no authority to issue the writs or to ensure their execution.

But the writ of Habeas Corpus is not merely important for its Constitutional efficacy with which it secures the liberty of the subject. A writer of authority has pointed out that it '*determines the whole relation of the judicial body towards the executive*'². For,² Dickey, the amenability of all officials from the highest to the lowest for all administrative acts to the ordinary law of the land, arms

*Law of
Const.
p. 207.*

*Its defects
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*Its Constitutional
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the judges through the issue and enforcement of this writ, with the power of reviewing and hampering even to the point of vetoing the action of the executive by their failure to find such action in accordance with the letter of the law. Two *illustrations* of this position must not be omitted. In the first place, the Tudors and Stuarts, notwithstanding all their claims of extra-legal power, were not so blind to the general reverence of Englishmen for their Common Law as to refuse the assistance of the lawyers. Something will be said presently of the position of the judges: but here it must be remarked that the conflicts of the seventeenth century over that position were due to the fact that, while the reforming Royalists such as Bacon and Wentworth regarded them as the best instruments of conservative innovation, the Parliamentary party held them as the exponents and defenders of the ancient liberties enshrined in the Common Law. Thus the question of *judicial independence* became part of the larger question of the maintenance of national rights, and even an inquiry into so technical a subject as the proper return to a writ of *habeas corpus* contained in itself an assertion, on the one side, of the need of a strong executive, and, on the other, of the permanent importance of the maintenance of popular rights. A second illustration of the connexion between the executive and the judicial bench may be drawn from the procedure in the so-called *Suspension of the Habeas Corpus Act*. It has been found expedient in times of political danger to pass temporary, generally annual, Acts suspending the action of the writ of *habeas corpus* in the case of persons charged with certain specified crimes such as treasonable practices. It is important to understand that there is never anything like a general suspension of the action of the writ in all cases. Such temporary suspensions were fairly frequent in the troubled times which succeeded the Revolution of 1688, and again in the Rebellions of 1715 and 1745, and during the intermediate Jacobite conspiracy of 1722, in all about nine times up to the last of these dates. For practically half a century no measures were taken to suspend the operation of the law; but then, in the apprehensions occasioned by the course of the French Revolution, Parliament under the guidance of Pitt took the hitherto unprecedented step of renewing for eight years in

succession (1794-1801) an Act which withdrew the benefit of the writ from all those charged with conspiring against the person and government of the king. But the power of the judicature in restraint of the executive was never more triumphantly acknowledged than in the means taken by the ministers of the day, on the expiration of this Act in 1801 and again on the occasion of the next and last suspension in England in 1817, to defend themselves against any legal consequences which they might have incurred during the suspension. For, the withdrawal of the application of the writs to persons charged with certain crimes does not preclude persons falsely charged from redress at the hands of their accusers when the suspension has been removed. The executive, therefore, in 1801 and in 1817 sought to protect itself against all legal consequences by procuring from Parliament Acts of Indemnity, that is to say, 'retrospective statutes which free persons who have broken the law from responsibility for its breach, and thus make lawful acts which when they were committed were unlawful'.¹ The limitation to this otherwise formidable and irresponsible power of the executive, which equals, if not surpasses that wielded by the most despotic of the Tudors or Stuarts, is found in the authorization of Parliament, a body ever jealous for the maintenance of individual liberty. Since 1817 there has been no suspension of the Habeas Corpus Act in England, although the history of Ireland has unfortunately a different tale to tell.

¹ Dicey,
*Law of
Const.*
p. 218.

§ 64. But besides the attempts to set at nought or to evade the action of the writ of Habeas Corpus, there were other methods of undermining the liberty of the individual, 'remnants,' as they have been called, 'of a jurisprudence which had favoured prerogative at the expense of liberty'.² Among such was a power employed by the Secretary of State, and based upon certain parts of the Acts for the regulation of the press which will be noticed presently, by which *general warrants* were issued for the apprehension of the unnamed authors, printers and publishers of a particular obscene or seditious libel. This practice grew up with the Acts after the Restoration, but survived the expiration of the Acts themselves in 1695. It was a very ready means for the exercise of much petty tyranny, both in the seizure of persons

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² Erskine
May,
*Const.
Hist.* iii.

(a) Issue of
general
warrants;

¹ Stubbs,
Const.
Hist. iii.
§ 488.

Boroughs
made into
Shires.

² Maitland,
Justice
and Police.
p. 71 note.

counties, with sheriffs and a shire jurisdiction of their own¹. This involved the final banishment of the sheriff of the shire from interference in their concerns. Henry I's charter had already given this privilege to London; but not for more than 200 years did any other town attain it. Edward III gave it to Bristol in 1373, Richard II to York in 1397. In the fifteenth century it became more common, and, finally, about eighteen towns procured the privilege, the majority of whom retain it to the present day². Such were the corporations which formed the strongholds of the Whigs when that party came into existence, and which, on that account, were attacked successively by Charles II and his brother James II. The details do not concern us here, for there was no alteration in the structure of the corporations, and none, except temporarily, in the class of persons of whom they were composed. It was not until the Reform Parliament that any change was made, and the Municipal Corporations Act of 1835 'provided a uniform constitution for all boroughs to which it applied, based on the model of the best municipal corporations.' This consisted of a council composed of the mayor, aldermen, and common councillors. The councillors are elected for three years, a third retiring annually, by all ratepaying residents of either sex, and their number is fixed at the time of incorporation. The aldermen are in number one third of that of the councillors, by whom they are appointed for six years, one half retiring triennially by rotation. The mayor is elected annually by the council from among the aldermen or councillors.

The judicial constitution of boroughs varies greatly. The Act of 1835 did away with the judicial authority of the aldermen and with the elected justices of the peace. In their place in every borough there were naturally two justices of the peace, the Mayor and ex-Mayor. But besides that, most boroughs of any size have a separate commission of the peace, which includes the county justices, together with some additional justices of their own. Further, it is possible for a borough to have a court of Quarter Sessions under a trained lawyer called a Recorder, and a Stipendiary Magistrate for a practically similar purpose. The whole judicial organization of the town is subject to the supervisory control of the High Court of Justice.

CHAPTER IX.

LIBERTY OF THE SUBJECT.

§ 63. THE freedom of the individual is the peculiar boast of the English people. The citizens of other nations share with us an equality of political privileges ; but few possess in the same degree that immunity from petty official tyranny which has hitherto made daily life in England freer than perhaps anywhere else in the civilized world. To the subjects of many European governments this personal liberty is guaranteed by an article of the written constitution under which they live. But the English constitution rests on no such written basis; and consequently this right, 'which consists in the power of locomotion, of changing situation, of moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law ¹, exists ¹ Stephen's *nowhere in English law as a stated principle*, except perhaps in *Commentaries* (11th ed.), a well-known article of the Great Charter. In other words, it is *secured indirectly*, 'by the strict maintenance of the principle that no man can be arrested or imprisoned except . . . under some legal warrant or authority, and . . . by the provision of adequate legal means for the enforcement of this principle ².' It is not, however, to be supposed that mediaeval England, except perhaps in degree, was more exempt than other nations from that 'ferocity of the times and the occasional despotism of jealous or usurping princes' (Stephen) which overrode all securities for liberty and, in too many countries, made government only another name for systematic oppression. A contempt for even the legal rights of individuals is no uncommon mark of that kind of rule by a despot

or a privileged class, which was most prevalent in the Middle Ages. Kings, nobles, and even Parliament, when it took upon itself judicial functions, only too frequently sacrificed the claims of individual right to their own interests or desires. And yet in England at least the means of securing this individual liberty of the freeman were coeval with the Common Law. How it was secured in Anglo-Saxon times, except as against actual enslavement, is not very clear; but with the introduction at the Norman Conquest, if not just before, of the system of procedure by writs, methods of redress against unlawful detention were abundantly provided. No less than four such writs seem to have been framed. The first was (a) the writ *de odio et atia*, which directed the Sheriff to inquire whether a prisoner accused of murder was committed upon reasonable suspicion or only *propter odium et atiam*, i. e. through malice; in order that in the latter case he might be admitted to bail, and so await his trial at the hands of the king's justices on their next Iter. But this writ was only issuable through royal favour, and advantage of this was taken by John to demand large sums of money for the privilege. Magna Carta (§ 36) provides that this, which it calls 'the writ of inquest of life or limb,' shall be given free without power of refusal. The application of the writ was restricted by the Statute of Gloucester (6 Edw. I, 1278), but the Statute of Westminster II (13 Edw. I, 1285) again removed all power of denial. It was abolished in 1354; 'but,' says Blackstone, 'as the Statute 42 Edw. III repealed all the statutes then in being, contrary to the Great Charter, Sir Edward Coke is of opinion that the writ *de odio et atia* was thereby revived.' (b) The writ of *mainprize* or *manuaptio* commanded the sheriff to take sureties, called *mainperners*, for the appearance of the prisoner and to set him at liberty; while (c) the writ *de homine replegiando* bade the same official to replevy or repledge, i. e. deliver a prisoner from custody 'in the same manner that chattels taken in distress may be replevied,' on bail being given for his subsequent appearance.

Writ of
Habeas
Corpus;

But all these remedies fell into disuse or were superseded by the still existing (d) writ of HABEAS CORPUS. Of this there seem to have been no less than five variations, the chief of which was the *Habeas Corpus ad subiciendum*. This form of

Secured by
issue of
writs.

the writ is not of privilege, but of right, existing at Common Law; and, therefore, cannot ordinarily be withheld. Originally it might be demanded from the Court of King's Bench by any prisoner or his friends, and could be addressed to any person, whether an authorized gaoler or not, who detained another person in custody, commanding such detainer 'to produce the body of the prisoner with the day and cause of his caption and detention, to do, submit to, and receive, whatsoever the judge or court awarding such writ shall direct.' But despite the apparent simplicity of the means for ensuring a prisoner against wrongful or arbitrarily prolonged detention, it was many centuries before the full and efficient working of the writ was finally secured. In the first place, the writ as being of right could not ordinarily be withheld by a judge on a statement of a prisoner's case by himself or his friends; but Sir Edward Coke, when Chief Justice in 1616, denied it to a man imprisoned for piracy, whose own statement seemed to establish the truth of the charge against him. But there was a much more important class of cases which threatened to annihilate altogether the action of the writ. The deeds or misdeeds of an English official, whether Prime Minister or parish constable, are amenable to the ordinary law of the land, tried in the ordinary courts; and the plea of official duty affords no excuse for the performance of an otherwise illegal act. But in France and many other nations of the European continent, members of the administration are protected in the discharge of their official duties by a particular law administered by special courts, which legalizes acts unlawful if done by a private person. The disadvantages of the English system in enabling the government by prompt action to check at its beginning a threatened disturbance of public order, have often been pointed out. Here it is necessary to notice that the English government has not always acquiesced in this interpretation of the law. The strong executive of the Tudors and early Stuarts was based upon a theory of the law similar to that of the French *droit administratif*¹. The formulated Stuart theory, upheld by the decision of the judges, as to the extraordinary power of the prerogative, or in other words, the discretionary power of the Crown, claimed among others the power of committing individuals to prison and retaining them

how
evaded.

¹ Dicey,
*Law of
Const.* pp.
326-9.

there without allowing the necessity of any further return to a writ of Habeas Corpus by the gaoler than that the prisoner was retained by special command of the king, *per speciale mandatum regis*. But this claim to a power of practically indefinite imprisonment was contrary not only to the spirit of Magna Carta which provided (§ 39) that no free man should be taken or imprisoned or otherwise penally dealt with unless by lawful judgment of his peers or by the law of the land; but also to the letter of a more explicit Statute of 1351-2 (25 Edw. III st. 5, c. 4) which, aiming directly at the exercise of extraordinary powers by the Privy Council, enacted that no one should be taken by petition or suggestion to the king unless it be by indictment or presentment or by writ original at the Common Law. The exercise of this power of commitment even by a single councillor, led to a formal complaint from the judges in 1591 addressed to the Chancellor, Sir Christopher Hatton, and the Treasurer, Lord Burleigh; which, however, while enumerating examples of illegal commitments, acknowledges that a committal 'by Her Majesty's special commandment, or by order from the Council board, or for treason touching Her Majesty's person,' is sufficient return to a writ of Habeas Corpus. It is clear, however, that the judges in this acknowledgment of the power of the Council, were only contemplating the alternative of bailing a prisoner or of remanding him back to prison. But the Council did not hesitate to use this power in a way that amounted to an entire refusal of trial to a prisoner committed *per speciale mandatum regis*. The admission of Chief Justice Anderson and his fellow judges in 1591 was used to justify the decision of the judges in the celebrated case of *Darnell* in 1627. A number of persons had been imprisoned by the Privy Council for refusal to contribute to a forced loan: five of them applied to the Court of King's Bench for a writ of Habeas Corpus; the gaoler made the return that they were confined *per speciale mandatum regis*, and the case of one of the plaintiffs, named *Darnell*, was argued out before the assembled judges. The plaintiff's counsel did not deny the right of the Council to commit to prison; but they asserted that the cause of commitment must be named in the warrant in order that the Court might decide whether the charge was one in which bail was allowed or not;

whereas the prisoner had merely been committed at the special command of the king. It was defended by the Attorney General on the ground that reasons of state might make a definite charge inexpedient in political cases. This, however, had nothing to do with the case. It was well known that the real cause of imprisonment was not the necessity of collecting scattered evidence of some deep conspiracy, but the refusal of the prisoners to contribute to a loan the levy of which they regarded as illegal and the legality of which the king dared not put to the test before the common-law courts. This the judges sufficiently recognized; for, while giving the case for the Crown, they refused to leave on record the assertion that the king need not specify the cause of commitment. As a direct answer to this decision the Petition of Right in the very next year, rehearsing that in violation of Magna Carta and of the Statute 25 Edw. III certain of the king's subjects had been detained by the king's special command alone, at the same time prayed that for the future no such imprisonment should be allowed. Yet this very definite prohibition did not prevent the committal, in the very next year, of Sir John Eliot, Selden, and others, at the special command of the king, on the general charge of 'notable contempts and stirring up sedition against the king and government'; nor did it even prevent the judges from delaying to find it bailable and thereby prolonging the imprisonment for two terms and a long vacation. Finally, the Statute of the Long Parliament which abolished the Star Chamber (16 Car. I, c. 10, 1641) provided that every one committed by the king himself or by the Council collectively or individually, could claim from the King's Bench or Common Pleas without any delay upon any pretence whatsoever, a writ of Habeas Corpus; and that within three days the Court should determine upon the legality of the commitment and act accordingly.

But if a direct refusal of the writ even to important prisoners of state, was thus forbidden, there were many ways which had always existed, of evading the action of the writ. Early attempts of the Commons under Charles II to remedy some of these defects failed through the opposition of the Lords; but matters were brought to a head by the case of *Jenkes*, a London citizen committed by the king in Council for what

Habeas
Corpus
Act.

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*Law of
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Methods of violating the liberty of the Subject.

² Erskine May, *Const. Hist.* iii.

(a) Issue of general warrants;

and of papers; but was continued inadvertently, perhaps, or more probably on the ground of usage, until the whole question was raised both in the law courts and in Parliament by a series of cases, the chief of which are associated with the name of Wilkes. In 1763, for the punishment of those who had so freely criticized the utterances of the government in No. 45 of the 'North Briton,' the Secretary of State (Lord Halifax), issued a general warrant for the apprehension of the authors, printers and publishers, together with their papers, the execution of which was personally superintended by Wood, the Under-Secretary. Under this warrant forty-nine persons were arrested, including the editor, John Wilkes, and a printer named Leach, but including also many perfectly innocent persons; and the whole proceedings were conducted with much arbitrary violence. The first action which resulted was that of several printers who had been arrested, against the messengers by whom the arrest was made, in which Lord Chief Justice Pratt, better known by his later title of Lord Camden, held that the warrant was illegal, and gave damages to the printers. *Wilkes* himself brought actions against both Lord Halifax and *Mr. Wood*. From the latter the verdict of the same Judge gave him £1000 damages; and when in 1769 his action against *Lord Halifax* was brought to an end, no less than £4000 damages were awarded. Meanwhile, in 1763, the printer *Leach* had also obtained a verdict with damages against one of the messengers named *Money*; and, on appeal to the Court of King's Bench, the judgment was upheld by Lord Mansfield. Finally, in 1765, in the case of *Entinck v. Carrington*, Lord Camden condemned the issue by the Secretary of State of a general search-warrant which placed all the books and papers of a specified individual at the mercy of the messengers who conducted the search. From the law courts the matter was taken into Parliament; and the decisions of Lord Camden in the Common Pleas and Lord Mansfield in the King's Bench were followed by resolutions of the House of Commons (1766), promoted by the Ministry of Lord Rockingham, which condemned as illegal general warrants whether for the seizure of persons or of papers. The refusal of the Lords to concur in a Declaratory Bill to this effect was of no moment in the light of the unanimous decisions of the law courts.

The state of certain departments of the law itself can for some time only be described as a direct encouragement of gross violations of personal liberty. The courts of equity, in cases where contempt of court had been committed, not merely by disrespect such as could be atoned for by an apology, but by failure to comply with its decrees through inability to pay the costs of an unsuccessful suit, thought nothing of relegating such unfortunate litigants to imprisonment for life. Indeed, the case of *debtors* in general was such as to encourage a considerable amount of petty tyranny. In the eyes of the law the person of the debtor was the property of his creditor until the debt was discharged; and the debtor, therefore, however solvent, was liable at any moment to arrest and detention in a prison whose horrors have become traditional. There was no distinction between the fraudulent and the unfortunate debtor; and both alike, if insolvent, were condemned to a life-long imprisonment. Several small measures of relief were passed from time to time in the eighteenth century; but the first general measure really dealing with the subject was the Insolvent Debtors Act of 1813 (53 Geo. III, c. 102) which distinguished between crime and misfortune by allowing an insolvent debtor to get his discharge by giving an account of all his debts and property. But Crown debtors were still exempted from the operation of this statute until 1827. In 1838 arrest for debt, which had been limited by previous statutes, was totally abolished, and the lands of the debtor were for the first time allowed to satisfy the claim. It was a natural corollary to the distinction recognized in 1813 that in 1861 (24 and 25 Vict. c. 134, § 221) fraudulent debt was, by the Bankruptcy Act, treated as a crime.

(b) life imprisonment of debtors;

And if the law treated English citizens so harshly, it was not likely that aliens would find much favour in its eyes. The institution of *negro slavery* had never been recognized by English law; although for the colonies or plantations, as they were commonly called, it had been legalized by several statutes. Although more than one English Judge had pronounced a pious opinion in favour of the freedom of a negro on English soil, yet the status of a colonial slave in England had never been called in question until 1772, when, in the case of James Sommersett, a negro who had been seized on his

(c) negro slavery;

refusal to return to his master's service, Lord Mansfield, in the trial which resulted on the issue of a writ of Habeas Corpus for his release, pronounced definitely that slavery in England was illegal, and so set the negro free. But despite the efforts of Wilberforce and his friends, and the promises of Pitt, the slave trade and the institution of slavery continued to be recognized in our colonies, until in 1807 the unceasing efforts of Charles James Fox were crowned with the well-merited success which he himself did not live to see, and the trade in negroes was absolutely forbidden to subjects of the British Crown.

(d) restrictions on foreign settlers.

With regard to *foreign settlers*, who came to England of their own free will, it will be seen in the next chapter that foreign merchants and Jews were under the special protection of the Crown, which exacted heavy tolls from them as a licence to trade, but at the same time granted them extensive privileges. From Edward I to the Commonwealth the Jews as a body had disappeared from England; but the policy of Edward III had encouraged the settlement of Flemish artisans, and from the time of the Reformation there was a constant stream of religious and political fugitives into the country, who brought with them some of the best blood and industry of France and the Netherlands. As the Crown had extended an especial protection over all foreigners, so it reserved to itself the right of expelling them from the country; but this power was not exercised after the early years of Elizabeth's reign. During the period of their residence in England all foreigners enjoyed the same personal liberty as British subjects: but by the Common Law they were unable to acquire land or to hold any public office, or even to exercise any civil rights. The only methods by which they could become English subjects were by denization under the king's letters patent, or by naturalization by Act of Parliament; and even those who did not undergo either of these processes were given a safe asylum against the persecutions of foreign governments. The first departure from these generous principles of treatment was due to the alarm of the French Revolution. In 1793 the *Alien Act*, which remained more or less in force until 1826 and was renewed for a short period in 1848, placed foreigners under a strict surveillance, and required that they should be registered and should live in certain specified districts. Yet even at this period the general principle of

repudiating the dictation of foreign governments as to dwellers on English soil was maintained, and Napoleon's arrogant demand that all adherents of the old French monarchy should be removed out of British dominions was met with a flat refusal. In 1844 a further step was taken in the passing of Mr. Hutt's *Naturalization Act*, which enabled aliens, on a certificate from the Home Secretary, or on taking the oath of allegiance, to acquire all the rights of a natural born subject short of eligibility for membership of Parliament or the Privy Council. This has been further amended and extended by the Naturalization Act of 1870. Finally, the protection afforded to foreigners has been somewhat modified by the signature of *Extradition treaties* with the United States in 1842, with France in 1843, and subsequently with most of the civilized nations of the world, by which each of the contracting parties agrees to surrender to the other criminals of that other nation found within its jurisdiction. Even during the excitement caused by the arrogant demands of Napoleon, the English government did not refuse to satisfy the latter's complaints of the attacks made on him by the press by the prosecution for libel on Napoleon of Jean Peltier, a refugee who, despite Mackintosh's able defence, was pronounced guilty though never punished. England has, however, steadily maintained her policy of asylum to political refugees as such, which, despite occasional abuse, such as the plotting on English soil of the Orsini conspiracy against the French government in 1858, has brought to our shores and domiciled among us, often for long years together, most of the advocates of individual liberty and self-government whose first and, only too often, succeeding efforts have failed of their deserts.

§ 65. There has been occasion already to notice the similarity between the ideas which animate the administration of more than one government of continental Europe, and those which the Tudor and early Stuart sovereigns endeavoured to realize in England. The parallel extends to the views as to the *duties of the administration towards the expression of opinion*. The Tudors, and their imitators, the first Stuart sovereigns, no less than the French or Belgian government of to-day, considered in all good faith that it was the duty of the administration to regulate 'the utterance and formation

Freedom
of opinion.
Methods of
repression.

(a) Control
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¹ For instances,
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of opinion¹ whether religious or otherwise. It was this consideration which in their opinion justified them in the maintenance of institutions and a system which, if it could have been carried out, bade fair to cut off all intellectual advance, and was even in its imperfections a formidable engine of tyranny over individuals and classes. The system was centred in that judicial committee of the Privy Council which has gained undying infamy as the *Star Chamber*. This body, as we have seen, exercised a supervision not only over great offenders who might have set at defiance the ordinary Courts of Common Law, but even over the petty details of private life which affected no one but the parties concerned. Indeed, it carried the principle of paternal government to a ridiculous excess, and arrogated to itself the duties of a public censor¹. It will easily be seen that, however excellent was the intention which underlay such action, the temptation and opportunities of individual oppression were as irresistible as they were manifold. The exaction of heavy fines often for what were little better than imaginary offences; the arbitrary power of arrest which was exercised by each Councillor as well as by the whole body; the intolerable interferences in private quarrels whether concerning persons or property; the methods of procedure by personal examination of the prisoner and by torture, both equally alien to the spirit and practice of the Common Law, all combined to render the abolition of the Star Chamber (1641) one of the best possible guarantees for the assurance of individual liberty.

(b) use of
spies and
informers ;

But if, after the downfall of this instrument of oppression, the executive did not still consider itself, in the same degree as heretofore, responsible for the guidance and control of popular opinion; yet it still deemed necessary certain measures of precaution which, though never to this day entirely dispensed with, have diminished with time, increased stability, and the removal of anticipations of treasonable outbreaks. The most arbitrary proceedings of the Star Chamber were based upon the evidence, if not of written papers often of a private nature, or of common rumour, at best of *spies and informers* who were not confronted with the prisoner whom their charges were to condemn. But the disappearance of that tribunal, followed as it was by a long period of political

unrest, did not allow government, even if such had been its wish, to dispense with the aid of such useful auxiliaries. The system continued until the present century, when the trials of those who took part in the disturbances of the period 1817-1820 furnished proofs that the conspirators had actually been urged to violence by the emissaries of the government, and the ministers who had used them incurred an odium due rather to the system than to their particular use of it; while the formation of a body of detective police has done away with the necessity of employing such agents.

The organization of the Post Office placed in the hands of an unscrupulous government another necessary but tempting means for interference with individual freedom. It was perhaps not unnatural that the State in its capacity of post-master should object to facilitate the correspondence of those who were plotting its destruction; and from the very first the foreign mails seem to have been carefully searched. Cromwell by an Act, and Charles II by a proclamation, reserved to the representative of the government *the right of* ^{(c) the power of opening private letters;} and finally, by an Act of Anne's reign, which has been confirmed by later statutes, the Secretary of State was armed with a power of issuing warrants for this purpose. Nor was the power suffered to remain idle; and while it was exercised for public purposes in 1722, 1745, and at other times of political danger, statesmen in office were not above making use of their privilege to incriminate their political opponents. In 1844 the avowal of the Secretary of State, Sir James Graham, that he had used this power produced a great uproar throughout the country, which he only quieted by proposing the appointment of a secret committee to examine into the law on the matter. The committee, which contained many of the leading statesmen of the day of both political parties, not only entirely justified Sir James Graham's conduct, but also recommended no alteration of the law. The Secretary of State, therefore, to this day retains his former authority to open letters.

But by far the most important method of influencing public opinion in the sixteenth and seventeenth centuries, was the strict *censorship* which, from the invention of printing to the end of the seventeenth century, was exercised *over all printed* ^{(d) censorship of the press;}

matter. At first this censorship was placed in the hands of the Church; but after the Reformation it became part of the prerogative of the crown, who appointed the licenser and granted a monopoly of printing to the Stationers' Company, to London, Oxford, Cambridge, the Archbishop of Canterbury and the Bishop of London. Under Elizabeth special statutes armed the judges with the power, through the verdicts of subservient juries, of punishing the publication of anything approaching to the expression of seditious opinions. Under these statutes sentence of death was passed upon *Udall* (1591) for an alleged libel on the bishops; *Barrow* and *Greenwood* (1586) for the writing of seditious books; and *Penry* for a suspected connexion with the Martin Marprelate tracts. But since the supervision of all opinion, whether spoken or written, was part of the royal prerogative, not least among the duties of the Star Chamber was its work in the suppression of all unlicensed political discussion. Under the two first Stuarts the opposition excited by their misgovernment kept the members active. The severe punishments of heavy fines, mutilation, whipping, imprisonment, or banishment, which were inflicted for various Puritan publications upon *Leighton* (1630), *Prynne*, *Burton*, *Bastwick* (1637), and *Lilburne* (1638), were merely specimens of the exercise of the prerogative of the Crown through the Council in this respect. The actual restrictions on the liberty of printing were drawn tighter by an ordinance of the Council. But the overthrow of the Star Chamber did not mend matters; and the severe restrictions imposed by the Long Parliament upon printing, produced the strong plea for freedom in Milton's 'Areopagitica.' After the Restoration the Licensing Act of 1662 placed the whole control of the press in the hands of the government, and the regulations were very similar to those which had been in vogue under Elizabeth. The Act was suffered to lapse from 1679 to 1685; but a decision of the judges armed the Crown with precisely analogous powers at Common Law. The Act, however, was revived on James II's accession, and lasted until 1695, when it was finally suffered to expire; and with its expiration 'a censorship of the press was for ever renounced by the law of England'.

But a theoretical freedom is compatible with very serious practical restrictions; and the direct control over the press

¹ Erskine
May, ii.
243.

only gave way to such serious impediments to free criticism and expression of opinion as were offered by the imposition of *a stamp duty on newspapers and advertisements*, and a vigorous execution of the laws of libel. The first Stamp Act of this kind was imposed in 1712 (10 Anne, c. 19) and was found so successful both as a means of revenue and as a check on the publication of cheap papers, that by the end of George II's reign it had been quadrupled in amount. In 1819, by one of the 'Six Acts,' the duty was extended to leaflets and tracts which had hitherto been considered too slight to be called newspapers, but which were widely circulated. But the Reform Act of 1832 was naturally followed by a different attitude on the part of the administration towards fugitive criticism and the means of its expression. The duty on advertisements was reduced in 1833 and abolished in 1853; and a similar fate befell the stamp on newspapers in 1836 and 1855 respectively. The last hindrance to the multiplication of cheap newspapers was swept away in the abolition of the duty on paper in 1861.

Perhaps a more serious impediment to freedom of discussion was really formed by *the partial administration and the iniquitous interpretation of the Law of Libel*. Party feeling ran so high under William III and Anne that every one was treated as a libeller who insulted the dominant party, and the whole influence of the government was used to procure his punishment by a sentence of the law courts. The effect of so potent a weapon at a time when political discussion was unusually active, can easily be imagined. Under the first two Georges the contempt of a government who had more efficacious means at its disposal, caused it to treat the libellous utterances of its opponents in the press with unusual tolerance. But meanwhile, it seems as if the judges had been maturing that perverted reading of the law which was not slow to declare itself on the increase of political discussion which marked the accession of George III, and in support of the government which determined to gag the expression of adverse opinion. This interpretation, gradually evolved as circumstances called it forth, consisted of three propositions, each of which may be identified for convenience sake with the particular case which established it. Although the chief interest of the trials which arose out of the publication of No. 45 of the 'North Briton' turned

the judges through the issue and enforcement of this writ, with the power of reviewing and hampering even to the point of vetoing the action of the executive by their failure to find such action in accordance with the letter of the law. Two *illustrations* of this position must not be omitted. In the first place, the Tudors and Stuarts, notwithstanding all their claims of extra-legal power, were not so blind to the general reverence of Englishmen for their Common Law as to refuse the assistance of the lawyers. Something will be said presently of the position of the judges: but here it must be remarked that the conflicts of the seventeenth century over that position were due to the fact that, while the reforming Royalists such as Bacon and Wentworth regarded them as the best instruments of conservative innovation, the Parliamentary party held them as the exponents and defenders of the ancient liberties enshrined in the Common Law. Thus the question of *judicial independence* became part of the larger question of the maintenance of national rights, and even an inquiry into so technical a subject as the proper return to a writ of *habeas corpus* contained in itself an assertion, on the one side, of the need of a strong executive, and, on the other, of the permanent importance of the maintenance of popular rights. A second illustration of the connexion between the executive and the judicial bench may be drawn from the procedure in the so-called *Suspension of the Habeas Corpus Act*. It has been found expedient in times of political danger to pass temporary, generally annual, Acts suspending the action of the writ of *habeas corpus* in the case of persons charged with certain specified crimes such as treasonable practices. It is important to understand that there is never anything like a general suspension of the action of the writ in all cases. Such temporary suspensions were fairly frequent in the troubled times which succeeded the Revolution of 1688, and again in the Rebellions of 1715 and 1745, and during the intermediate Jacobite conspiracy of 1722, in all about nine times up to the last of these dates. For practically half a century no measures were taken to suspend the operation of the law; but then, in the apprehensions occasioned by the course of the French Revolution, Parliament under the guidance of Pitt took the hitherto unprecedented step of renewing for eight years in

succession (1794-1801) an Act which withdrew the benefit of the writ from all those charged with conspiring against the person and government of the king. But the power of the judicature in restraint of the executive was never more triumphantly acknowledged than in the means taken by the ministers of the day, on the expiration of this Act in 1801 and again on the occasion of the next and last suspension in England in 1817, to defend themselves against any legal consequences which they might have incurred during the suspension. For, the withdrawal of the application of the writs to persons charged with certain crimes does not preclude persons falsely charged from redress at the hands of their accusers when the suspension has been removed. The executive, therefore, in 1801 and in 1817 sought to protect itself against all legal consequences by procuring from Parliament Acts of Indemnity, that is to say, 'retrospective statutes which free persons who have broken the law from responsibility for its breach, and thus make lawful acts which when they were committed were unlawful'.¹ The limitation to this otherwise formidable and irresponsible power of the executive, which equals, if not surpasses that wielded by the most despotic of the Tudors or Stuarts, is found in the authorization of Parliament, a body ever jealous for the maintenance of individual liberty. Since 1817 there has been no suspension of the Habeas Corpus Act in England, although the history of Ireland has unfortunately a different tale to tell.

¹ Dicey, *Law of Const.* p. 218.

§ 64. But besides the attempts to set at nought or to evade the action of the writ of Habeas Corpus, there were other methods of undermining the liberty of the individual, 'remnants,' as they have been called, 'of a jurisprudence which had favoured prerogative at the expense of liberty'.² Among such was a power employed by the Secretary of State, and based upon certain parts of the Acts for the regulation of the press which will be noticed presently, by which *general warrants* were issued for the apprehension of the unnamed authors, printers and publishers of a particular obscene or seditious libel. This practice grew up with the Acts after the Restoration, but survived the expiration of the Acts themselves in 1695. It was a very ready means for the exercise of much petty tyranny, both in the seizure of persons

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² Erskine May, *Const. Hist.* iii.

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unrest, did not allow government, even if such had been its wish, to dispense with the aid of such useful auxiliaries. The system continued until the present century, when the trials of those who took part in the disturbances of the period 1817-1820 furnished proofs that the conspirators had actually been urged to violence by the emissaries of the government, and the ministers who had used them incurred an odium due rather to the system than to their particular use of it; while the formation of a body of detective police has done away with the necessity of employing such agents.

The organization of the Post Office placed in the hands of an unscrupulous government another necessary but tempting means for interference with individual freedom. It was perhaps not unnatural that the State in its capacity of post-master should object to facilitate the correspondence of those who were plotting its destruction; and from the very first the foreign mails seem to have been carefully searched. Cromwell by an Act, and Charles II by a proclamation, reserved to the representative of the government *the right of* ^{(c) the} *opening letters*; and finally, by an Act of Anne's reign, which has been confirmed by later statutes, the Secretary of State was armed with a power of issuing warrants for this purpose. ^{power of opening private letters;} Nor was the power suffered to remain idle; and while it was exercised for public purposes in 1722, 1745, and at other times of political danger, statesmen in office were not above making use of their privilege to incriminate their political opponents. In 1844 the avowal of the Secretary of State, Sir James Graham, that he had used this power produced a great uproar throughout the country, which he only quieted by proposing the appointment of a secret committee to examine into the law on the matter. The committee, which contained many of the leading statesmen of the day of both political parties, not only entirely justified Sir James Graham's conduct, but also recommended no alteration of the law. The Secretary of State, therefore, to this day retains his former authority to open letters.

But by far the most important method of influencing public opinion in the sixteenth and seventeenth centuries, was the strict *censorship* which, from the invention of printing to the ^{(d) censor-} *end of the seventeenth century, was exercised over all printed* ^{ship of the} *press*; ^{press;}

matter. At first this censorship was placed in the hands of the Church; but after the Reformation it became part of the prerogative of the crown, who appointed the licenser and granted a monopoly of printing to the Stationers' Company, to London, Oxford, Cambridge, the Archbishop of Canterbury and the Bishop of London. Under Elizabeth special statutes armed the judges with the power, through the verdicts of subservient juries, of punishing the publication of anything approaching to the expression of seditious opinions. Under these statutes sentence of death was passed upon *Udall* (1591) for an alleged libel on the bishops; *Barrow* and *Greenwood* (1586) for the writing of seditious books; and *Penry* for a suspected connexion with the Martin Marprelate tracts. But since the supervision of all opinion, whether spoken or written, was part of the royal prerogative, not least among the duties of the Star Chamber was its work in the suppression of all unlicensed political discussion. Under the two first Stuarts the opposition excited by their misgovernment kept the members active. The severe punishments of heavy fines, mutilation, whipping, imprisonment, or banishment, which were inflicted for various Puritan publications upon *Leighton* (1630), *Prynne*, *Burton*, *Bastwick* (1637), and *Lilburne* (1638), were merely specimens of the exercise of the prerogative of the Crown through the Council in this respect. The actual restrictions on the liberty of printing were drawn tighter by an ordinance of the Council. But the overthrow of the Star Chamber did not mend matters; and the severe restrictions imposed by the Long Parliament upon printing, produced the strong plea for freedom in Milton's 'Areopagitica.' After the Restoration the Licensing Act of 1662 placed the whole control of the press in the hands of the government, and the regulations were very similar to those which had been in vogue under Elizabeth. The Act was suffered to lapse from 1679 to 1685; but a decision of the judges armed the Crown with precisely analogous powers at Common Law. The Act, however, was revived on James II's accession, and lasted until 1695, when it was finally suffered to expire; and with its expiration 'a censorship of the press was for ever renounced by the law of England¹.'

¹ Erskine
May, ii.
243.

But a theoretical freedom is compatible with very serious practical restrictions; and the direct control over the press

only gave way to such serious impediments to free criticism and expression of opinion as were offered by the imposition of a stamp duty on newspapers and advertisements, and a vigorous execution of the laws of libel. The first Stamp Act of this kind was imposed in 1712 (10 Anne, c. 19) and was found so successful both as a means of revenue and as a check on the publication of cheap papers, that by the end of George II's reign it had been quadrupled in amount. In 1819, by one of the 'Six Acts,' the duty was extended to leaflets and tracts which had hitherto been considered too slight to be called newspapers, but which were widely circulated. But the Reform Act of 1832 was naturally followed by a different attitude on the part of the administration towards fugitive criticism and the means of its expression. The duty on advertisements was reduced in 1833 and abolished in 1853; and a similar fate befell the stamp on newspapers in 1836 and 1855 respectively. The last hindrance to the multiplication of cheap newspapers was swept away in the abolition of the duty on paper in 1861.

Perhaps a more serious impediment to freedom of discussion was really formed by the partial administration and the iniquitous interpretation of the Law of Libel. Party feeling ran so high under William III and Anne that every one was treated as a libeller who insulted the dominant party, and the whole influence of the government was used to procure his punishment by a sentence of the law courts. The effect of so potent a weapon at a time when political discussion was unusually active, can easily be imagined. Under the first two Georges the contempt of a government who had more efficacious means at its disposal, caused it to treat the libellous utterances of its opponents in the press with unusual tolerance. But meanwhile, it seems as if the judges had been maturing that perverted reading of the law which was not slow to declare itself on the increase of political discussion which marked the accession of George III, and in support of the government which determined to gag the expression of adverse opinion. This interpretation, gradually evolved as circumstances called it forth, consisted of three propositions, each of which may be identified for convenience sake with the particular case which established it. Although the chief interest of the trials which arose out of the publication of No. 45 of the 'North Briton' turned

rather on the question of the legality of general warrants; yet in the trial of the printers Lord Mansfield had laid it down (1) *that it was the province of the judge alone to determine the criminality of a libel*. This left to the jury merely the determination of the comparatively immaterial issue of the fact of its publication, which in the majority of cases would not be disputed. This reading of the law was accepted and enforced by all the judges with the sole exception of Lord Camden. The juries, however, not unnaturally resented an interpretation which practically removed the sole remaining security for freedom of the press; and they endeavoured to escape from it in indirect ways. Thus in the trial of *Woodfall* (1770), the original publisher in the 'Morning Advertiser' of Junius' celebrated 'Letter to the King,' the jury, with a clever perception of the real meaning of the judge's charge and to his infinite annoyance, found the defendant 'guilty of printing and publishing only.' In the contemporaneous case of *Miller*, on the same charge, the jury practically challenged Lord Mansfield's doctrine, which transferred the trial from the jury to the judge, by a verdict of 'not guilty.' In fact, this interpretation of the law was strenuously combated both in Parliament by such authorities as Lords Chatham and Camden, Sir G. Savile and Burke; and in the law courts by Erskine in his defences of the Dean of St. Asaph (1779) and of Stockdale (1789). But common sense and equity was alike bound to triumph; and in 1792, chiefly by the advocacy of Charles James Fox who in his earlier career had defended Lord Mansfield's interpretation, the *Libel Act* was passed, despite the opposition of the majority of the judges and leading exponents of the law. By this the right of the jury to determine in a case of libel upon the guilt of the whole matter was distinctly affirmed; and a dangerous weapon of attack upon the liberty of the subject, in the free and legitimate expression of opinion, was removed. But if this was the most insidious of the judicial interpretations of the law, the two others were no less subversive of the real spirit of individual liberty. In 1731, on the trial of a certain *Franklin* for a libel in the 'Craftsman,' the judge had strongly ruled (2) *that falsehood was not essential to the guilt of a libel*, and had refused to allow the production of any evidence tending to prove the

truth of the statements which formed the ground of the accusation. This was merely to bring into conformity with the Common Law the action of the judges since the Revolution in condemning the expression of any opinion adverse to the government of the day. Again, in the case of *Almon*, a bookseller who was tried for selling a reprint of Junius' 'Letter to the King' (1770), Lord Mansfield added to his other interpretation a proposition (3) *that a publisher was criminally responsible for the acts of his servants*; and this was soon interpreted to mean that the publication of a libel by a servant was conclusive proof of the connivance of the master. Both these propositions were accepted as the reading of the law for sixty years after the first interpretation had been exploded by the Libel Act. The period which followed 1792 was one of strong reaction in the growth of freedom; and the repressive measures of a government, not unnaturally but, as the event proved, unnecessarily alarmed at the threatened outbreak of popular opinions, for a time at least suspended many of those safeguards of individual liberty which had been already secured. Thus it was only in 1843 that Lord Campbell's *Libel Act* (6 & 7 Vict. c. 96) allowed a defendant to plead in excuse the truth of an unfavourable criticism and its publication for the public benefit; and a publisher to prove the publication of a libel without his consent.

The liberty of the press was thus placed upon its present footing. Unlike the law of many European nations, freedom of discussion in England does not rest upon the guarantee of an article in the constitution. There is no censorship of the press; and misuse of the press is punished by the ordinary courts. Thus such punishment is only inflicted for statements which shall be proved to be a breach of the law. In other words, the law of the press is merely part of the law of libel: the offence consists in its publication, and all concerned, whether writer, publisher, or printer, are individually and equally liable. As it has been pithily described, 'freedom of discussion in England is little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written'.¹

§ 66. One of the most formidable menaces to individual liberty, until comparatively recent times, was supplied by the

¹ Dicey,
Law of
Const.
p. 231.

(g) dependence of the judges on the Crown.

connexion between the executive and the judicial body. So little was the necessity understood for a separation between these two powers, that it was by no means uncommon for an official, whether a member of the Council or a sheriff, to judge an offender against an order which he had himself issued. This method had the advantage, in the eyes of a bureaucratic government, of ensuring for its members immunity from any legal consequences which their arbitrary acts might have incurred. And even the establishment of a more highly organized system of administration has only very gradually recognized the distinction between the executive and the judicial powers. The Lord Chancellor still forms part of every Cabinet: until little more than a century ago the Chancellor of the Exchequer from time to time exercised judicial functions: early in the present century the Lord Chief Justice Ellenborough was a member of the ministry of 'All the Talents' (1806). The connexion of the judges with the Commune Concilium, and so with the House of Lords, has been noticed in an earlier chapter. Their position as councillors of the Crown in judicial matters, and thus defenders of the royal prerogative, or, as Bacon described them, as 'lions under the throne,' was not questioned until the inroads upon individual liberty by this means, of which the Stuarts were guilty, withdrew from Englishmen the protection of that Common Law in which had lain their boasted security from oppression as a nation. Indeed, no small portion of the strength of the Stuarts rested on the fact that the kings had on their side, in the majority of cases, the technical interpretation of the law. Thus, although there was so much opposition to the Crown among the lawyers, that in 1628 Charles I contemplated excluding lawyers from Parliament, as in 1626 he had excluded some of the country gentry by making them sheriffs; yet the decisions of the law courts were quite subservient to the wishes of the Crown. This marked difference in the sentiments of lawyers who were in office and those who were not bound by an official position is easily accounted for. It is ever the natural tendency of the legal profession, in its desire to exalt the authority both of the law and of the courts which administered it, to reverence perhaps unduly the supposed source of the law. But while, on the one side, the lawyers, if left to themselves, naturally looked at the king

The judges under the Stuarts.

through the medium of the Common Law, the judges and legal officials would be as much disposed on their part to regard the law through the medium of the king. To lawyers out of office, then, the law was the first consideration, and its guardianship the most sacred trust of the royal prerogative: the judges and others who were appointed by the king, and held office only during his good pleasure, gave their first thought to the interpretation of the royal will through the medium of the existing law, and were thus not infrequently led to give decisions both prejudicial to individual liberty and subversive of the plain teaching of the Common Law. Thus it is carefully to be borne in mind that, without the exercise of any undue influence on the part of the Crown, the judges were prepared to give decisions favourable to the prerogative or even to the known wishes of the monarch. Of this there were two noteworthy instances under James I, at the very beginning of the quarrel between the Commons and the Crown. In 1606, in the celebrated case of *Bate*, the judges distinguished between the ordinary and extraordinary prerogative of the Crown, attributed to the latter the right of levying the customs, for the refusal to pay which the prisoner was being tried, and defined it as a power which the Commons could in no way diminish. In the case of *Calvin* (1608), or, as it should more rightly be, Colville, in accordance with the strong desire of the king and in the face of a Parliament unwilling to legislate on the matter, twelve out of fourteen judges decided that Scotch *post-nati*, i. e. those born after the accession of James I to the English throne, were natural-born subjects of the English Crown. This position of the judges as servants, in a very real and important sense, of the Crown, may be illustrated in three ways. (1) At the present day, the government, when in doubt as to the legality of a proposed course of action, takes the advice of the law officers of the Crown—the Attorney- and Solicitor-General for the time being. The government of the seventeenth century in a similar predicament consulted the judges. It thus came about, especially under the early Stuarts, that the judges were often called upon to take part in cases in which they had already pledged themselves by the expression of an extra-judicial opinion. Thus they had been called upon to give such opinions, under Elizabeth, as to

the legality of commitments by council, with a result already noticed: under James I, as to the legal power and limits of proclamations, when, however, the judges, under the leadership of Coke, pronounced a decision adverse to the Crown: and similarly under Charles I, as to the binding force of the ✓ Petition of Right, which they proceeded to explain away; and as to the legality of the levy of ship-money, in which they fully upheld the action of the Crown. (2) Until the time of the Stuarts the dismissal of a judge for political reasons had been an event of the rarest occurrence, and throughout the reign of ✓ Elizabeth not a single instance of such dismissal is to be found. But with the dismissal of Chief Justice Coke by James I in 1616 the judges were given cause to realize that they held office at the king's good pleasure, nor were they allowed to forget it. In 1626 Chief Justice Crew was dismissed for refusing to acknowledge the legality of forced loans: in 1630 Chief Baron Walter met with a like fate for questioning the lawfulness of actions taken against members of the House of Commons for their conduct in the House; while in 1634 ✓ Chief Justice Heath's opposition to ship-money caused his summary removal from the bench. These are only the more prominent instances of the use of a power which, so long as it existed, was too tempting to leave unemployed. For, the Restoration still left the appointment of the judges entirely in the king's hands; and the removal of other means of influence made it doubly necessary that Charles II and his brother should have a subservient bench. Thus under Charles II, three Lord Chancellors, Clarendon, Shaftesbury, and Bridgeman (who was, however, only Lord Keeper), three chief justices, and six judges were dismissed notoriously for political reasons. James used his authority even more arbitrarily; for in three years he had purged the bench of no less than twelve judges who had refused to aid him in his schemes; and, more thorough in his methods than his predecessor, he set himself to break the power of the gentry by systematically striking off the lists of justices of the peace those who were not sufficiently complaisant to his wishes. But (3) the Tudors and early Stuarts had in the Star Chamber an instrument for keeping in subservience the Courts of Common Law. Among other ways of effecting this, the members of that body did not hesitate to use their extra-

legal authority for the purpose of reprimanding the judges who might have given a decision adverse to the Crown, or had refused to submit to the royal dictates. Thus, in the case of *Commendams*, as it is called, the judges, under the leadership of Coke, refused to obey the royal command to stay their judgment until they had spoken with the king. The rest of the judges were forced by the Star Chamber to submission, and Coke's obduracy was punished with dismissal.

Indeed, the one great exception to the ordinary attitude of the Stuart judges was *Sir Edward Coke*. He had in his early days sought advancement by subservience to the Crown; and, as Attorney-General, he conducted the case against the conspirators of the Gunpowder Plot. In 1613 he had been made Chief Justice of the King's Bench. But what he valued more than high position or royal favour was the Common Law, of which he was the most learned exponent of his time. He was in no sense a statesman, but a lawyer pure and simple, and, like the common lawyers of the day, most pedantic in his treatment of the law. In the three years during which he was at the head of the Common Law Courts he made it his endeavour (a) to bring all the courts in England under the Court of King's Bench, and (b) to set up the twelve judges as arbiters between the Crown and the nation. His attempt to gain these two objects brought him into collision with three powerful bodies. By his issue of prohibitions which laid upon (i) *the ecclesiastical courts* the preliminary burden of proving that cases which came before them lay within their jurisdiction, he fell foul of those courts in the cases of *Fuller* and *Sir William Chancey*. The Statute of Praemunire forbade appeals to any other court against sentences obtained in the king's courts. Coke, by premising that the king's court meant the Courts of Common Law alone, attempted in the cases of *Glanville* and *Allen* to twist this statute into a bar to the claim of (ii) *Chancery* to hear appeals from decisions of the Courts of Common Law. The king, however, came to the rescue, and, by the advice of the Attorney-General Bacon, who was Coke's professional and political rival, he confirmed the claim of Chancery. But Coke did not scruple to quarrel with (iii) *the Crown* itself. He had a particular dislike to the extra-judicial opinions demanded of the judges, and in 1610, in the

matter of the Proclamations, gave a decision adverse to the Crown ; while in 1611 he opposed the attempt which the king made to put an end to the practice of prohibitions. In 1613 the king showed his resentment by transferring him from the headship of the Common Pleas to that of the King's Bench, a technical promotion whose loss of salary made it a real punishment. But Coke's new position only spurred him on to the accomplishment of the two objects which he had set before himself. In the case of *Peacham* he not only objected to an attempt of the Council to intimidate the judges by the 'auricular taking of opinions,' that is, the scheme of consulting them individually, but his adverse decision forced that body to leave the trial to the ordinary process of the Common Law. Finally, his refusal to submit to the royal wishes in the case of *Commendams* filled up the measure of his iniquities in the eyes of the Crown, and in 1616 he was dismissed from the King's Bench and the Privy Council. He entered Parliament and became the leader of the legal party in the opposition, thus identifying the popular cause with the maintenance of the law. He had a chief hand in the drafting of the Petition of Right, but death removed him some time before the outbreak of the Civil War (1634).

To the later Stuarts this power of intimidation through the Council was denied, but they 'packed' the bench with a shamelessness as well as a success which left them no cause to regret the loss of the other means of influence. The number of those actually dismissed has been enumerated. Charles II and James II took every care to appoint in their place fit instruments for the work in hand. The most unscrupulous was appointed Chief Justice at a critical moment—Scroggs, with a view to the trials arising out of the Popish Plot ; Pemberton in order to condemn Lord William Russell ; Saunders to annul the charters of the boroughs : while James, in all methods more violent than his predecessor, employed his subservient bench to legalize that dispensing power, which in Charles' hands had twice failed, for the admission of Roman Catholics into the army by their decision in the collusive action of *Godden v. Hales*. The state to which the bench of judges was thus reduced may be gathered from the fact that, after the Revolution, all the ten judges who were then in office, were summarily dismissed.

The Revolution removed the means of some of the worst excesses of the Stuarts ; although for others, equally important, the haste with which the Bill of Rights had been drawn up, forced the country to wait some years. Among these was the appointment and tenure of the judges, which at length found mention in the Act of Settlement (1700), wherein it was provided (§ 7), that, after the accession of the Hanoverian line, 'judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established ; but upon the address of both Houses of Parliament, it may be lawful to remove them.' In two particulars, however, these important officials still remained personally attached to the Crown : their commissions ceased on the death of the reigning sovereign, and part of their salary continued to be a charge upon the Civil List. Both these drawbacks to the complete independence of the judges were removed on the accession, and largely by the personal initiative of George III. The judges were thus freed from all those sinister influences which had in the seventeenth century made them the most powerful allies of the administrative in its inroads upon individual liberty. But the authority of the Crown did not thereby lose a chief support in its contests with social disorder. The whole previous training of the judges places them upon the side of existing authority, and the omnipotence of precedents in the English law courts is a formidable barrier to anything approaching violent innovation. Thus during the alarms caused by the progress of French revolutionary principles, the sternest upholder of authority could not have accused the judges of any undue predilection for the liberty of opinion ; and the repressive measures of the legislature were only too well seconded by the severe sentences of the judges on all prisoners charged with seditious acts or speeches. But the severity of the judges overshot the mark, and the outrageous sentences passed in England between 1792 and 1794 upon Thomas Paine for his book 'The Rights of Man,' and others of lesser note, and especially in Scotland, upon Thomas Muir, the Rev. Fyshe Palmer, and William Skirving, the secretary of a society calling itself 'the Convention of the Friends of the People' in Edinburgh, who were all three condemned to varying terms of transportation, caused a strong reaction in popular feeling.

The judges
since the
Revolution
of 1688.

The juries, which had at first been in complete harmony with the judges, began as their only alternative to acquit political prisoners, and a lull followed in indictments for political offences. The measures of the legislature proved sufficient to repress all attempts at unlicensed association for political purposes; but the freedom of the press was more difficult to curb. Here too, however, the judges came to the rescue of the government, and from 1799 to 1811 the laws of libel were administered in such a way as left little to be desired by those in authority. The subject need not be pursued further. Similar feelings animated the conduct of the judges in the trials which resulted from the renewal of social disorder between 1817 and 1820; but the complete vindication of authority on the one side, and the infusion of a milder and more sympathetic spirit into the legislature on the other, have combined to render unnecessary any such accumulation of harsh laws backed up by severe judicial sentences, as those which so unhappily characterized the last half of the long reign of George III.

(h) liabilities of the jury.

It remains to be briefly noted, in this connexion, that it is only comparatively recently that trial by jury has formed a real safeguard to the liberty of the individual. It has been seen that the jury did not entirely cast off the character of witnesses from local knowledge, in favour of its modern form of judges of fact, long, if at all, before the Tudor times. The members of a jury, then, found themselves assailed by two dangers. They, no less than the judges, were liable to (a) *summons before the Star Chamber* for verdicts contrary to the wishes of the executive, and to severe punishments if they refused to reconsider what they had done. Thus, in 1554, the jury which had acquitted Sir Nicholas Throckmorton, who was charged with treasonous participation in Wyatt's rebellion, were heavily fined and imprisoned. A more legal, though not less iniquitous, restraint upon a jurymen was (b) *a personal responsibility for his verdict*. From the time of Henry II, by a writ of attain, the verdict of a jury in civil cases was liable to review at the hands of a fresh jury of twenty-four. In so far as the first jury was regarded as local witnesses, a reversion of their verdict convicted them of perjury, and the members were punished with imprisonment and their lands and goods forfeit

to the king. With the definite change in the character of the jury from witnesses to judges of fact the writ of attaint fell into disuse, though it was not legally abolished until 1826. But the jury were still considered amenable to legal penalties for their verdict, until the decision of Chief Justice Vaughan in the case of Bushell (1679) discharged them of all such personal responsibility. Yet for some time it seemed as if the jury had only escaped from the Star Chamber to fall into the hands of the judge. Charles II attempted to secure the condemnation of his political opponents through juries manipulated by sheriffs in the royal interest. He did indeed so obtain the execution of Lord William Russell and Algernon Sidney, while the leader of the opposition, Shaftesbury, only saved himself from a similar fate by a timely flight. But all the intimidation exercised by the judges was ineffectual to force the jury to subservience. Despite the bullying of Jeffries, the seven bishops were acquitted. Indeed, after the Revolution the judges discovered that their only avenue to complete control over a prisoner's fate lay in a perverse misreading of the law. Such must be the explanation of the extraordinary interpretation of the law of libel which was noticed a few pages back¹. The undue severity exercised by¹ p. 402. the judges in the political trials of the revolutionary period, were at last met by the juries with the same courage with which their predecessors had met and finally vanquished the judges' view of the libel laws: and sentences of acquittal in the case of Miller (1770), Hardy and John Horne Tooke (1794), and Hone (1817)—to mention but a few of the most prominent—were a conclusive proof that the *judicium parium* promised by Magna Carta was indeed a reality, and that the surest guarantee for individual liberty would not be sacrificed by those to whose best interest it was that it should be maintained inviolate.

§ 67. One of the most serious dangers which from time The Arm to time threatened the individual liberty of Englishmen, came from the undue use and extension of the principles of MILITARY SERVICE. This may conveniently be described in connexion with the history of the methods employed at various times for the defence of the country against foreign attack. The land forces may be said to have been based

rather on the question of the legality of general warrants; yet in the trial of the printers Lord Mansfield had laid it down (1) *that it was the province of the judge alone to determine the criminality of a libel*. This left to the jury merely the determination of the comparatively immaterial issue of the fact of its publication, which in the majority of cases would not be disputed. This reading of the law was accepted and enforced by all the judges with the sole exception of Lord Camden. The juries, however, not unnaturally resented an interpretation which practically removed the sole remaining security for freedom of the press; and they endeavoured to escape from it in indirect ways. Thus in the trial of *Woodfall* (1770), the original publisher in the 'Morning Advertiser' of Junius' celebrated 'Letter to the King,' the jury, with a clever perception of the real meaning of the judge's charge and to his infinite annoyance, found the defendant 'guilty of printing and publishing only.' In the contemporaneous case of *Miller*, on the same charge, the jury practically challenged Lord Mansfield's doctrine, which transferred the trial from the jury to the judge, by a verdict of 'not guilty.' In fact, this interpretation of the law was strenuously combated both in Parliament by such authorities as Lords Chatham and Camden, Sir G. Savile and Burke; and in the law courts by Erskine in his defences of the Dean of St. Asaph (1779) and of Stockdale (1789). But common sense and equity was alike bound to triumph; and in 1792, chiefly by the advocacy of Charles James Fox who in his earlier career had defended Lord Mansfield's interpretation, the *Libel Act* was passed, despite the opposition of the majority of the judges and leading exponents of the law. By this the right of the jury to determine in a case of libel upon the guilt of the whole matter was distinctly affirmed; and a dangerous weapon of attack upon the liberty of the subject, in the free and legitimate expression of opinion, was removed. But if this was the most insidious of the judicial interpretations of the law, the two others were no less subversive of the real spirit of individual liberty. In 1731, on the trial of a certain *Franklin* for a libel in the 'Craftsman,' the judge had strongly ruled (2) *that falsehood was not essential to the guilt of a libel*, and had refused to allow the production of any evidence tending to prove the

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p. 231.

(g) dependence of the judges on the Crown.

connexion between the executive and the judicial body. So little was the necessity understood for a separation between these two powers, that it was by no means uncommon for an official, whether a member of the Council or a sheriff, to judge an offender against an order which he had himself issued. This method had the advantage, in the eyes of a bureaucratic government, of ensuring for its members immunity from any legal consequences which their arbitrary acts might have incurred. And even the establishment of a more highly organized system of administration has only very gradually recognized the distinction between the executive and the judicial powers. The Lord Chancellor still forms part of every Cabinet: until little more than a century ago the Chancellor of the Exchequer from time to time exercised judicial functions: early in the present century the Lord Chief Justice Ellenborough was a member of the ministry of 'All the Talents' (1806). The connexion of the judges with the Commune Concilium, and so with the House of Lords, has been noticed in an earlier chapter. Their position as councillors of the Crown in judicial matters, and thus defenders of the royal prerogative, or, as Bacon described them, as 'lions under the throne,' was not questioned until the inroads upon individual liberty by this means, of which the Stuarts were guilty, withdrew from Englishmen the protection of that Common Law in which had lain their boasted security from oppression as a nation. Indeed, no small portion of the strength of the Stuarts rested on the fact that the kings had on their side, in the majority of cases, the technical interpretation of the law. Thus, although there was so much opposition to the Crown among the lawyers, that in 1628 Charles I contemplated excluding lawyers from Parliament, as in 1626 he had excluded some of the country gentry by making them sheriffs; yet the decisions of the law courts were quite subservient to the wishes of the Crown. This marked difference in the sentiments of lawyers who were in office and those who were not bound by an official position is easily accounted for. It is ever the natural tendency of the legal profession, in its desire to exalt the authority both of the law and of the courts which administered it, to reverence perhaps unduly the supposed source of the law. But while, on the one side, the lawyers, if left to themselves, naturally looked at the king

The judges under the Stuarts.

through the medium of the Common Law, the judges and legal officials would be as much disposed on their part to regard the law through the medium of the king. To lawyers out of office, then, the law was the first consideration, and its guardianship the most sacred trust of the royal prerogative: the judges and others who were appointed by the king, and held office only during his good pleasure, gave their first thought to the interpretation of the royal will through the medium of the existing law, and were thus not infrequently led to give decisions both prejudicial to individual liberty and subversive of the plain teaching of the Common Law. Thus it is carefully to be borne in mind that, without the exercise of any undue influence on the part of the Crown, the judges were prepared to give decisions favourable to the prerogative or even to the known wishes of the monarch. Of this there were two noteworthy instances under James I, at the very beginning of the quarrel between the Commons and the Crown. In 1606, in the celebrated case of *Bate*, the judges distinguished between the ordinary and extraordinary prerogative of the Crown, attributed to the latter the right of levying the customs, for the refusal to pay which the prisoner was being tried, and defined it as a power which the Commons could in no way diminish. In the case of *Calvin* (1608), or, as it should more rightly be, *Colville*, in accordance with the strong desire of the king and in the face of a Parliament unwilling to legislate on the matter, twelve out of fourteen judges decided that Scotch *post-nati*, i.e. those born after the accession of James I to the English throne, were natural-born subjects of the English Crown. This position of the judges as servants, in a very real and important sense, of the Crown, may be illustrated in three ways. (1) At the present day, the government, when in doubt as to the legality of a proposed course of action, takes the advice of the law officers of the Crown—the Attorney- and Solicitor-General for the time being. The government of the seventeenth century in a similar predicament consulted the judges. It thus came about, especially under the early Stuarts, that the judges were often called upon to take part in cases in which they had already pledged themselves by the expression of an extra-judicial opinion. Thus they had been called upon to give such opinions, under Elizabeth, as to

the legality of commitments by council, with a result already noticed: under James I, as to the legal power and limits of proclamations, when, however, the judges, under the leadership of Coke, pronounced a decision adverse to the Crown: and similarly under Charles I, as to the binding force of the ✓ Petition of Right, which they proceeded to explain away; and as to the legality of the levy of ship-money, in which they fully upheld the action of the Crown. (2) Until the time of the Stuarts the dismissal of a judge for political reasons had been an event of the rarest occurrence, and throughout the reign of ✓ Elizabeth not a single instance of such dismissal is to be found. But with the dismissal of Chief Justice Coke by James I in 1616 the judges were given cause to realize that they held office at the king's good pleasure, nor were they allowed to forget it. In 1626 Chief Justice Crew was dismissed for refusing to acknowledge the legality of forced loans: in 1630 Chief Baron Walter met with a like fate for questioning the lawfulness of actions taken against members of the House of Commons for their conduct in the House; while in 1634 ✓ Chief Justice Heath's opposition to ship-money caused his summary removal from the bench. These are only the more prominent instances of the use of a power which, so long as it existed, was too tempting to leave unemployed. For, the Restoration still left the appointment of the judges entirely in the king's hands; and the removal of other means of influence made it doubly necessary that Charles II and his brother should have a subservient bench. Thus under Charles II, three Lord Chancellors, Clarendon, Shaftesbury, and Bridgeman (who was, however, only Lord Keeper), three chief justices, and six judges were dismissed notoriously for political reasons. James used his authority even more arbitrarily; for in three years he had purged the bench of no less than twelve judges who had refused to aid him in his schemes; and, more thorough in his methods than his predecessor, he set himself to break the power of the gentry by systematically striking off the lists of justices of the peace those who were not sufficiently complaisant to his wishes. But (3) the Tudors and early Stuarts had in the Star Chamber an instrument for keeping in subservience the Courts of Common Law. Among other ways of effecting this, the members of that body did not hesitate to use their extra-

legal authority for the purpose of reprimanding the judges who might have given a decision adverse to the Crown, or had refused to submit to the royal dictates. Thus, in the case of *Commendams*, as it is called, the judges, under the leadership of Coke, refused to obey the royal command to stay their judgment until they had spoken with the king. The rest of the judges were forced by the Star Chamber to submission, and Coke's obduracy was punished with dismissal.

Indeed, the one great exception to the ordinary attitude of the Stuart judges was *Sir Edward Coke*. He had in his early days sought advancement by subservience to the Crown; and, as Attorney-General, he conducted the case against the conspirators of the Gunpowder Plot. In 1613 he had been made Chief Justice of the King's Bench. But what he valued more than high position or royal favour was the Common Law, of which he was the most learned exponent of his time. He was in no sense a statesman, but a lawyer pure and simple, and, like the common lawyers of the day, most pedantic in his treatment of the law. In the three years during which he was at the head of the Common Law Courts he made it his endeavour (a) to bring all the courts in England under the Court of King's Bench, and (b) to set up the twelve judges as arbiters between the Crown and the nation. His attempt to gain these two objects brought him into collision with three powerful bodies. By his issue of prohibitions which laid upon (i) *the ecclesiastical courts* the preliminary burden of proving that cases which came before them lay within their jurisdiction, he fell foul of those courts in the cases of *Fuller* and *Sir William Chancey*. The Statute of Praemunire forbade appeals to any other court against sentences obtained in the king's courts. Coke, by premising that the king's court meant the Courts of Common Law alone, attempted in the cases of *Glanville* and *Allen* to twist this statute into a bar to the claim of (ii) *Chancery* to hear appeals from decisions of the Courts of Common Law. The king, however, came to the rescue, and, by the advice of the Attorney-General Bacon, who was Coke's professional and political rival, he confirmed the claim of Chancery. But Coke did not scruple to quarrel with (iii) *the Crown* itself. He had a particular dislike to the extra-judicial opinions demanded of the judges, and in 1610, in the

matter of the Proclamations, gave a decision adverse to the Crown ; while in 1611 he opposed the attempt which the king made to put an end to the practice of prohibitions. In 1613 the king showed his resentment by transferring him from the headship of the Common Pleas to that of the King's Bench, a technical promotion whose loss of salary made it a real punishment. But Coke's new position only spurred him on to the accomplishment of the two objects which he had set before himself. In the case of *Peacham* he not only objected to an attempt of the Council to intimidate the judges by the 'auricular taking of opinions,' that is, the scheme of consulting them individually, but his adverse decision forced that body to leave the trial to the ordinary process of the Common Law. Finally, his refusal to submit to the royal wishes in the case of *Commendams* filled up the measure of his iniquities in the eyes of the Crown, and in 1616 he was dismissed from the King's Bench and the Privy Council. He entered Parliament and became the leader of the legal party in the opposition, thus identifying the popular cause with the maintenance of the law. He had a chief hand in the drafting of the Petition of Right, but death removed him some time before the outbreak of the Civil War (1634).

To the later Stuarts this power of intimidation through the Council was denied, but they 'packed' the bench with a shamelessness as well as a success which left them no cause to regret the loss of the other means of influence. The number of those actually dismissed has been enumerated. Charles II and James II took every care to appoint in their place fit instruments for the work in hand. The most unscrupulous was appointed Chief Justice at a critical moment—Scroggs, with a view to the trials arising out of the Popish Plot ; Pemberton in order to condemn Lord William Russell ; Saunders to annul the charters of the boroughs : while James, in all methods more violent than his predecessor, employed his subservient bench to legalize that dispensing power, which in Charles' hands had twice failed, for the admission of Roman Catholics into the army by their decision in the collusive action of *Goddan v. Hales*. The state to which the bench of judges was thus reduced may be gathered from the fact that, after the Revolution, all the ten judges who were then in office, were summarily dismissed.

The Revolution removed the means of some of the worst excesses of the Stuarts ; although for others, equally important, the haste with which the Bill of Rights had been drawn up, forced the country to wait some years. Among these was the appointment and tenure of the judges, which at length found mention in the Act of Settlement (1700), wherein it was provided (§ 7), that, after the accession of the Hanoverian line, 'judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established ; but upon the address of both Houses of Parliament, it may be lawful to remove them.' In two particulars, however, these important officials still remained personally attached to the Crown : their commissions ceased on the death of the reigning sovereign, and part of their salary continued to be a charge upon the Civil List. Both these drawbacks to the complete independence of the judges were removed on the accession, and largely by the personal initiative of George III. The judges were thus freed from all those sinister influences which had in the seventeenth century made them the most powerful allies of the administrative in its inroads upon individual liberty. But the authority of the Crown did not thereby lose a chief support in its contests with social disorder. The whole previous training of the judges places them upon the side of existing authority, and the omnipotence of precedents in the English law courts is a formidable barrier to anything approaching violent innovation. Thus during the alarms caused by the progress of French revolutionary principles, the sternest upholder of authority could not have accused the judges of any undue predilection for the liberty of opinion ; and the repressive measures of the legislature were only too well seconded by the severe sentences of the judges on all prisoners charged with seditious acts or speeches. But the severity of the judges overshot the mark, and the outrageous sentences passed in England between 1792 and 1794 upon Thomas Paine for his book 'The Rights of Man,' and others of lesser note, and especially in Scotland, upon Thomas Muir, the Rev. Fyshe Palmer, and William Skirving, the secretary of a society calling itself 'the Convention of the Friends of the People' in Edinburgh, who were all three condemned to varying terms of transportation, caused a strong reaction in popular feeling.

The judges
since the
Revolution
of 1688.

available force, (β) sometimes only a *quota* was called out, as in 1231 when a writ was issued to the Sheriff of Gloucester for the equipment of 200 men at the expense of those who were

¹ *Sel. Chart.* not called out¹: (γ) the fyrd was *connected with the police system*, and was organized under a constable for that purpose².

p. 360.

² *Ibid.*

p. 372.

The double and, in early days, inseparable duties of military service and of police in its various departments had always been incumbent on the freemen of the country in their local organizations. Henceforth the latter tended to become their chief employment, and the *Statute of Winchester* (1285) under Edward I summed up its position after all these changes, further organizing the whole system in the matter of equipment and placing it under the superintendence of appointed justices³. Indeed, the military duties of the fyrd were already

³ *Ibid.* pp. 470-2.

being rendered useless by the employment of new methods of raising troops. The duty, enforceable by the Common Law, of service in the fyrd, combined with the custom of making use of a quota of the troops, whether feudal or national, at the king's disposal, led to the granting of *Commissions of Array* to royal officers for the forcible levy or impressment of a specified number of men. Thus, in 1282, Edward I had commissioned a certain William de Butiller to 'elect'—that is, to press or pick—1000 men in Lancashire. From this time the use of this method of raising troops becomes frequent, with the addition that sometimes, as in 1294, the numbers of the men to be impressed were not fixed beforehand. Under Edward I men thus impressed were taken into the royal service and paid by the king: but under Edward II commissions of array became a grave national abuse and a heavy item of indirect taxation; for the counties and townships where the troops were levied, were forced to pay their wages and to supply them with better arms than the Statute of Winchester required. The result was so convenient to the king that Parliament had to return again and again to the attack of the abuse. A statute of 1327, repeated in 1352 and confirmed in 1402, established the principle that except in cases of invasion such troops should not leave their counties, and then only by acquiescence of

⁴ Cf. p. 214. Parliament and at the expense of the Crown⁴. This, however, by no means stopped the evil. Such commissions were issued frequently under the Tudors and the early Stuarts; and during

the Scotch war of Charles I, the levying of *Coat and Conduct Money* was a revival of the old illegal methods of forcing the localities to pay for the troops so raised.

Meanwhile, the old obligations of the *fyrð* had not been extinguished. A revival of them took place in the reign of Edward VI and Queen Mary when, by a statute of 1550, amended by another in 1558, the force organized on the old method of the compulsory possession of arms in accordance with the amount of wealth, was taken away from the sheriff and placed under the supervision of a new officer, the lord-lieutenant of the county. The effect of this, however, was short-lived; for under James I the repeal of the Statute of Winchester did away with the special obligations to possess arms, though not of course with the common law obligation of defence; and the want was supplied by the collection of provisions and magazines of arms into one place in each county. One of the first acts of the Long Parliament was to condemn commissions of array or the compulsory impressment of soldiers to serve outside the country, as illegal, 'save in case of necessity of invasion or by reason of tenure.' They went even further, for the two 'Army Plots,' whereby the king attempted to use the army which had been raised for the Scotch war, for the purpose of overawing Parliament, led the Commons to secure for their own nominees the command of the local forces. It was proposed, therefore, in 1642, that Parliament should take into its own hands the nomination of the lords-lieutenant who should obey the orders of the House of Commons, and should for two years be irremovable by the king. Despite Charles' refusal, they proceeded to carry this into effect, and were thus guilty of as great illegality as the king who, notwithstanding the statute of the previous year, levied troops by commissions of array. The first motion of the Restoration Parliament was a declaration that any Act was invalid without the king's consent, and that the sole command of any force by land or sea, or of the national militia, was in the hands of the Crown. At the same time, provision was made by statute for keeping up the militia as a national force; and it acquired a great popularity, not only on account of its strong local connexion, but because it was regarded as emphatically the army of the nation as opposed to the regular troops who formed

The
modern
Militia.

particularly the army of the Crown. The king appointed the lords-lieutenant with the power of nominating officers and with the general control of a force in which the liability to service now rested upon property. It became, in fact, a local force officered by the local gentry, manned by their tenants, and controlled in the county itself. Both socially and constitutionally it enjoyed an unique position. But the continued maintenance of the standing army caused it, during the first half of the eighteenth century, to fall into neglect, and on its reorganization in 1757 considerable changes in detail, though not in the local principle, were introduced. The power of the central authority was increased, for the Crown was given a veto on the appointment of officers; the number of men to be raised was settled beforehand and apportioned to each district, and the choice was to be made by ballot; while, instead of special exemption as hitherto, the militia at times of service was liable to the Mutiny Act. The Crown was, at the same time, given the important power, with the ultimate sanction of Parliament, of embodying or specially calling out the militia in case of apprehended invasion or of rebellion. The force was embodied on several occasions previous to 1815: but the large numbers of men which were drafted from it into the army, especially during the Peninsular war, did away with much of its special character as a defensive force. After 1815 the militia fell into decay, and in 1829 the ballot was suspended. But in 1852 the force was revived and placed upon its modern footing; and during the Crimean war it did excellent service in the garrisons both of the United Kingdom and of the Mediterranean fortresses. But the present organization of the militia has entirely robbed it of that local connexion which was its special boast. Enlistment has become voluntary, though resort might be had to the ballot if the numbers fell short of those fixed by Parliament. The new army system inaugurated in 1871 gave the deathblow to the old militia; for the control has been removed from the lords-lieutenant and vested in the Crown through the Secretary of State; the money voted for the militia forms part of the army estimates, and not, as formerly, a separate grant; while the regiments themselves are reckoned as battalions of the regiments of the line, which take their name from and have their headquarters in the respective counties.

But the readiness of the nation to accept the obligations of the ancient fyrd is not to be measured by the number of enlistments in the modern militia. The 'citizen armies' which a system of conscription has given to many European nations, find their counterpart in the English *Volunteers*. Societies for national defence can be traced as early as the Tudor times, and are still represented in the Honourable Artillery Company of London. The trained bands of the City, which were so prominent during the Civil Wars and the Commonwealth, probably come under the same head. But the first general formation of a volunteer force came when the American War of Independence had caused Ireland to be almost denuded of her usual garrison, and a threatened invasion from France led to the acceptance by the government of several voluntarily enlisted corps for the defence of Ireland, which soon numbered over 40,000 men. This organization became political, and played no unimportant part in procuring Irish parliamentary independence and the establishment of what is known in history as 'Grattan's Parliament.' The Napoleonic wars gave another occasion for the formation of large corps of volunteers in England as well as Ireland. These, however, with the exception of some still existing cavalry called *Yeomanry*, were disbanded on the conclusion of peace. The present volunteer force owes its origin to the danger which threatened England from the attitude of France and the United States at the time when her hands were occupied with the Indian Mutiny and the Chinese War. An old Act of 1804 was revived in 1859, which empowered the Crown to accept the services of corps of volunteer troops; and a new Act of 1863 allowed the sovereign, with the ultimate sanction of Parliament, to call them out for service on any apprehension of invasion. As the force became permanent its ranks were filled not merely, as at first, with the well-to-do, but with the artisan class; voluntary subscriptions were not sufficient for its maintenance, and Parliament voted a regular grant which forms part of the annual Army Estimates. The permanent strength of the force numbers considerably over 200,000 men, consisting of light horse, artillery, engineers, and especially riflemen. The heavy cavalry is supplied by the yeomanry, consisting of rather more than 10,000 troops. The present organization of the volunteers is governed by the

The
modern
Volunteer
force.

Regulation of Forces Act (44 & 45 Vict. c. 57, § 9) passed in 1881.

Mercen-
aries.

§ 69. Thus in the formation of a modern army the old obligation of tenure has altogether disappeared; while that arising from allegiance has been revived in a voluntary method which has practically staved off any necessity for the full legal enforcement of the original obligation. But for the defence of the country in the first instance, and practically for all offensive warfare, all other methods of raising troops have been abandoned in favour of the principle of (3) *Payment*. The first mercenaries in England were Cnut's Huskarls, a Danish body-guard of several thousand men. In fact, at first all hired soldiers were foreigners. William I's army at Hastings was a volunteer mercenary army drawn from almost every part of western Europe; and in 1085 his troops which repelled the invasion of the Danes, consisted of *solidarii*, footmen and archers from France and Brittany. Again, Henry I took into his pay many of the Flemings who had survived the First Crusade. Indeed, the foreigners introduced in one way and another by the Norman kings formed the mainstay of the armies of both Stephen and Matilda. But by the treaty of Wallingford provision was made for the removal of all such aliens from England, and their banishment was one of the most popular acts in Henry II's restoration of civil government. For the next century or more the kings fought their wars abroad with mercenaries hired with the proceeds of scutage—Henry II with men from Brabant, Wales and Galloway, to whom Richard I added Basques and Navarese, many of such troops being outlaws or returned Crusaders. On two occasions only were they brought to England—in 1174, when a body of Flemings was landed to repel invasion and was withdrawn after a month; and in 1213, when John raised a mercenary army against the barons and, despite the prohibition of Magna Carta (§ 5)¹, retained them in arms for the later struggle. This time they were not so easily disposed of, for it was only with the expulsion of Falkes de Breauté in 1224 that the last of them disappeared. But the desire of the kings to rid themselves of the feudal levy, the increasing restriction of the fyrd to duties of police, and the dislike of the English people to the presence of foreign troops, all combined with the longer

¹ *Sel. Chart.*
p. 302.

duration of wars to force the king to seek new methods of supplying himself with an army. These were found in the semi-feudal retinues of the great lords, who agreed to supply the king with bands of men at a fixed rate of pay. It was with an army formed chiefly in this manner that the battles of the Hundred Years War were fought. But the nobles' retinues were broken up by the legislation of Henry VII; and the Tudor sovereigns relied upon commissions of array and, for personal defence, upon a small permanent body called Yeomen of the Guard.

The modern army owes its beginning to the great Civil War. In 1645 the parliamentary forces were organized on a definite basis, and in 1653 the Instrument of Government provided for a standing army of 30,000 men. When this army was disbanded at the Restoration, the king managed to retain as guards a small body of about 5,000 troops, including Monk's Coldstreams and some cavalry, which he hoped to make the nucleus of a force to aid his schemes of despotism. But one legacy of the rule of Cromwell and his Major Generals was an intense national antipathy to a professional army. Consequently, in 1667, when the king hastily raised 12,000 troops for the Dutch war, the Commons unanimously resolved to request him to disband them on the conclusion of peace. Again, in 1673, when levies were raised for the second Dutch war, Parliament voted the maintenance of any troops other than the militia to be a national grievance; and in 1678, when 20,000 troops were enrolled on the pretext of a French war, supplies were only granted on condition that these should be disbanded. James II, nothing daunted by these evidences of popular feeling, set to work to provide himself with a reliable force. While, on the one side, he tried to suppress the militia by dismissing all lords-lieutenant whom he could not trust, and by disarming the propertied classes who formed the body of the force; on the other side, he increased the numbers of the standing army, and placed it under officers on whom he could rely. Monmouth's rebellion gave him an excuse for raising new regiments, into which, in defiance of the Test Act and on the strength of the judicial decision of *Godden v. Hales* in favour of his dispensing power, he introduced Roman Catholic officers. He used the pretext of a London riot, which had been provoked by the open celebration of Roman Catholic

The
modern
mercenary
army.

rites, to place these troops in a permanent camp on Hounslow Heath. But popular feeling was so strong that even this army expressed delight at the acquittal of the seven bishops; and on William of Orange's advance a large portion of it deserted James. Considering the uses to which Charles and James had designed to put their army, it is not wonderful that the Bill of Rights declared the maintenance of a standing army in time of peace to be illegal. Peace, however, did not come till the treaty of Ryswick in 1697, when Parliament voted the reduction of the army to 7,000 men. But the long war which occupied almost the whole of Anne's reign, the danger from the Jacobites during the earlier years of the Hanoverian dynasty, the Austrian Succession and the Seven Years wars, the war of American Independence, and the long struggle with Napoleon, all necessitated the existence of a large standing army, and, by accustoming the people to its presence, removed from their minds the old apprehensions of danger. Meanwhile the measures taken for its maintenance and discipline were such as removed all sting implied in the old taunt that it was the king's army. The method of appropriation of supplies dictated the financial clauses of the *Mutiny Act*, on which, from 1689, the legal maintenance of the army depended. This was, with few and insignificant exceptions, (1) an annual measure authorizing, among other things, the keeping up of a certain specified number of troops and providing the necessary funds. This Act is the strongest constitutional guarantee for an annual parliamentary session; for without it the maintenance of an army becomes illegal, and by it Parliament retains a hold on the armed forces of the nation.

Martial
law.

But the Mutiny Act or, as in this particular it has been called since 1881, the Army Act, provides also for the discipline of the army by special and appropriate methods. (2) *Martial law*, or the summary discipline of military service, was originally enforced by the Court of Chivalry, presided over by the Earl Marshal or the Lord High Constable, the officers responsible for the ordering of the feudal array in the field. But as the feudal host was in theory an army of occupation, the jurisdiction of this court extended to offences committed in time of peace as well as during actual service. As the Courts of Common Law became organized in the hands of

trained lawyers, the frequent complaints made against the arbitrary action of this court caused its restriction by statute, and under Richard II the powers of its officials were defined and limited to time of war. During the Wars of the Roses martial law was used by both sides for the speedy punishment of prisoners, and they were subjected to all kinds of strange legal systems by such learned ruffians as Tiptoft, Earl of Worcester, who is said to have tried his victims by the law of Padua. Under the Tudors the Court of Chivalry fell into disuse; for, after the death of the Duke of Buckingham (1521), the office of Constable was only revived for a coronation, and the court only continued to be held before the Earl Marshal for civil cases, passing in time into the modern College of Heralds. But the want of a summary military tribunal was corrected by the issue by the king, in time of war or rebellion, of Articles of War whose administration was entrusted to specially constituted bodies of persons. Thus those who had taken part in the Pilgrimage of Grace (1536) and in Sir Thomas Wyatt's rebellion (1550) were so punished. Under Elizabeth this mode of summary punishment was put to more dubious uses. In 1573 the Queen was with difficulty dissuaded from applying it to a fanatic named Burchell who had attempted the life of Sir John Hawkins. Again, in 1588, a royal proclamation subjected to martial law all introducers of Papal bulls into England; while in 1595 Sir Thomas Wylford was appointed Provost Marshal of London for the purpose of so punishing some riotous apprentices. It was in accordance with this prerogative power of decreeing martial law that Charles I not only billeted the troops he had raised for the Spanish war on those who had refused to contribute to his forced loans, but issued a commission to certain persons to apply such summary remedies for restraining some disorders of which the troops were guilty. Thus, while Elizabeth applied it to civilians, Charles did not scruple to use it in time of peace. The Petition of Right (1628) condemned both the billeting and the use of martial law. But with the advent of a standing army it was necessary to make provisions for its proper discipline in peace as well as war. Charles II and his successor, acting on the analogy of the old royal authority to issue Articles of War, added Articles which regulated the punishment of soldiers by

the civil courts in time of peace. But something more than this was necessary, otherwise desertion would be little more than a breach of contract, and a blow given to an officer would fall under the head of a common assault. Accordingly, when the Mutiny Acts for the first time definitely authorized the maintenance of an army, ministers contented themselves with merely supplementing the right always exercised by the Crown of issuing Articles in times of war; mutiny and desertion were made punishable with death, whether the troops were on active service or not. In 1715 the Mutiny Act of that year gave the Crown the right of issuing Articles time of peace, and this continued until 1879, when these Articles were drawn together into a code of military law which, with amendments, exists to the present day.

Legal
position of
the soldier.

The result of the Mutiny Act and its successor, the Army Act, is to provide a special code of law applicable to a special class of persons in a special part of their relations with their fellow men. It is important to realize that a soldier is not exempt from, and therefore does not lose the protection of the Common Law. He has been aptly likened to the clergyman, in that he incurs 'special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship'.¹ In French law it is a fundamental principle that every kind of offence committed by a soldier must be tried by a military tribunal. In England, on the other hand, the soldier is in a twofold position as (a) citizen and (b) soldier. (a) In his former and original capacity he is subject to the same liabilities both criminal and civil which any civilian would incur, and he is amenable to the courts of Common Law. The extent of this liability is clear from two well-known cases of the last century. During the riots which followed Wilkes' election to Parliament in 1768 the mob pelted the magistrates and troops. The latter, before leave had been given to fire, shot a man who was declared to be a ringleader, and at the coroner's inquest the verdict of wilful murder was brought in against the soldiers specially concerned. It is immaterial to the present argument that they were acquitted on their trial. Again, in 1780, when the question of the legality of the use of the military in the suppression of the Gordon riots was raised in the House of Lords, Lord Mans-

¹ Dicey,
*Law of
Const.*
p. 275.

field defended it on the ground that the troops had been called in as citizens employed to preserve the laws and the constitution; for a soldier did not by enlistment lose his citizenship. But such a double position could not possibly be maintained if it involved a conflict of jurisdictions between civil and military courts. As it is, the connexion between the courts is quite clear. Enlistment is a civil proceeding which since 1694 has taken place before a justice of the peace; it is the business of the civil courts to determine whether any individual is subject to the jurisdiction set up by the Mutiny Act; while any excess of jurisdiction on the part of military courts would be met by the issue of a writ of Habeas Corpus and the discharge of the prisoner from custody. (b) The soldier's exceptional capacity may now be dismissed in a few words. Although even the plea of acting under orders does not excuse him in the committal of a criminal act which is tried by the civil courts, on the other hand there are certain classes of acts which by the special position of the soldier are exalted from slight misdemeanours into serious crimes. These would include, besides all negative acts of neglect of military rules, such positive breach of discipline as would be implied in an assault upon an officer.

It has been said that enlistment is a civil proceeding: in other words it is a contract between the Crown and the individual who takes service in the army. Thus the standing army of the last two centuries is a mercenary force. But the prerogative right of *impressment*, which may be regarded as little else than a compulsion to fulfil the old obligations which lay upon every freeman, has never been abolished. Its use for soldiers was condemned by the Long Parliament except in cases of sudden invasions, and the only violation of this Act was an authorization by Parliament in 1779, during the American War of Independence, of the impressment of all 'idle and disorderly persons' in whose behalf no one was disposed to complain of the breach of individual liberty involved. Ready enlistment in time of war and the formation of a volunteer force have hitherto rendered any extensive recourse to this prerogative right unnecessary. It may be remarked in conclusion, that, since the statute of 1641, any force raised by this means in time of national danger, would have to be

Methods
of raising
an army.
(1) Im-
pressment.

disbanded as soon as the danger which made it lawful has passed away. It affords no means of maintaining a standing army.

(2) Voluntary enlistment.

A standing army, then, is one raised by voluntary enlistment and sanctioned from year to year by Parliament. Enlistment is a contract, but it has not always been made by the same people. The first volunteer mercenary armies of Englishmen were raised by contract between the king and some of the great nobility; and even after the army became a permanent force, this method of recruiting was for a long time sustained. An individual officer with a commission as colonel was authorized to raise a regiment of a certain strength: he made his own terms with the recruits, and paid them out of his share of the sum voted by Parliament for the support of the army. This system was employed as late as the Crimean War: but meanwhile, in 1783 the Crown took over the duty of recruiting and, consequently, paying the troops direct. As to the length of service, from the first parliamentary recognition of a standing army the contract made by the soldier was for life unless he was discharged by the Crown. But in 1847 the period of service was for the first time limited to a maximum term of twenty-one years. A minimum term was also appointed within which the soldier could only get his discharge by payment of a sum of money, and it is this minimum limit which has been chiefly curtailed by the subsequent Enlistment Acts of 1870 and 1879.

Government of the army.

No more apt illustration could be given of the suspicion which originally attended the maintenance of a standing army than the provision made for its management. This 'exhibited a medley of conflicting jurisdictions,' the result of which was that 'the soldier was fed by the Treasury and armed by the Ordnance Board: the Home Secretary was responsible for his movements in his native country; the Colonial Secretary superintended his movements abroad: the Secretary at War took care that he was paid, and was responsible for the lawful administration of the flogging which was provided for him by the Commander-in-Chief'.¹ Thus the modern War Office has grown from the gradual amalgamation of (a) the *Ordnance Board*, controlled by the Master General of Ordnance, who was in the eighteenth century the chief adviser of the government in all

¹ Anson, *Law and Custom of Const.* pp. 355-6.

military matters; (*b*) the office of the *Secretary at War* which began with the standing army under Charles II, and the holder of which until 1783 was responsible to the Crown alone; in 1793 the establishment of the office of General Commanding-in-Chief divided the control of the army between a permanent military and a permanent civil authority; while in 1794 the appointment of a special Secretary of State for War overshadowed, but did not extinguish, the older official; (*c*) the Commissariat, which was a department of the Treasury. The first great change in the control of the army was due to the Crimean War. In 1855 the Secretary of State for War was separated from the Secretaryship for the Colonies, which had in 1801 been added to his duties; the Secretary at War was amalgamated with him, and the other two departments were placed under him. The enormous amount of work entailed on the Secretary of State by this absorption of so many separate offices, led in 1870 to a division of the work into three departments—Military, Ordnance and Finance, the heads of the two latter being appointed by the Secretary of State and holding office during his pleasure. Finally, in 1888 the Surveyor General, the head of the Ordnance, was abolished, and the military and civil sides of his work respectively were handed over to the heads of the two other departments. Of these the Commander-in-Chief, the permanent head of the military profession in entire subordination to the Secretary of State, is surrounded by a staff of the heads of military departments at the Horse Guards, and makes all military appointments, for which, however, the Secretary of State, as the supreme head, is responsible. The Financial Secretary at the War Office is the head, under the Secretary of State, of all the civil side of military administration. The power thus left to the Commander-in-Chief consists chiefly of a certain amount of patronage, and is in no way likely to threaten danger to the prevailing constitutional arrangements of the country.

§ 70. In striking contrast with the feeling long entertained The Navy. in the country about the army, the maintenance of the NAVY has never roused any jealous suspicion among Englishmen at large. And yet the actual amount of interference with the freedom of the individual which has been based on the plea of the maintenance of the navy, has been greater, or at any rate

more striking, than any which the exigencies of the army produced. Two such will at once occur to the reader—the levy of ship-money in the reign of Charles I, and the employment of press-gangs, whose deeds in the last century are so notorious. But Englishmen were proud of their navy, and knew it to be necessary for the defence of their shores, their commerce and their colonies; so that, although the adoption of other methods has rendered resort to such measures unnecessary, up to the present moment no law like the Act of the Long Parliament forbidding impressment for the army except in the case of grave national danger, protects the sanctity of our homes from the invasion of the press-gang. *The means by which the navy has at various times been manned* fall under three heads—(1) the duty laid upon the Cinque Ports; (2) hire or forcible impressment both of ships and men from the mercantile marine at other ports; (3) voluntary enlistment to serve on ships provided by the Crown.

It is to be remembered that there was no permanent royal navy until the time of the Tudors. The sovereign possessed a few vessels which answered the purpose of the present royal yachts; for they were only intended to take the king to and fro between his various dominions. And if there were no ships, much less was there any permanent staff of seamen. Even for some time after the foundations of a royal navy had been laid, the ships were laid up in dock in time of peace and entrusted to the guard of a few caretakers. But at a time when no ship could leave a harbour unless she were armed with sufficient strength to resist attack from pirates, it only needed the organization of a system which could be put in force at necessity, to procure for the Crown a very adequate supply both of ships and men. Thus at the siege of Calais by Edward III, of the 730 ships said to have been employed, with nearly 15,000 men on board, only 25 were royal vessels, bearing the meagre equipment of 419 men; while the fleet which met the Armada at a time when the English navy had really been begun, consisted of 176 vessels and 15,000 men, out of which only 34 ships and 6,000 men belonged to the royal service.

The first attempt at such organization by the Crown was an application of obligations analogous to those of the feudal levy.

Ælfred, to whom, among so many other things, the foundation of the English navy is ascribed, found it so difficult to procure sailors at home that he had to man his ships with Frisian mercenaries. One of his successors seems to have laid the obligation of providing a vessel upon an estate of a certain size, and Æthelred may merely have systematized this method when he directed that every 300 hides of land should furnish a ship (1008). That this obligation was not only incumbent on the seaboard districts, is sufficiently clear from the mention in this connexion of Wiltshire and Worcestershire. This system, however, did not outlast the Norman Conquest, although it is probably responsible for the custom which prevailed long after, by which ships from the same counties went into battle side by side. Nor does there seem to have been any arrangement before the Conquest for procuring sailors to man the ships. Both wants were provided by William I's incorporation of the (1) *Cinque Ports*. These were originally the five ports of Dover, Hastings, Hythe, Romney, and Sandwich. To these were subsequently added (1191) the 'ancient towns' of Winchelsea and Rye; and gradually, at later dates, some of them corporate towns, with the title of limb or member, were attached to one or other of the chief ports. This powerful corporation possessed all the apparatus of self-government under a lord warden, who for some time was the nearest approach in England to an admiral of the seas. He held his Court of Chancery, now abolished, in St. James' Church at Dover; he presided over the Shepway or local parliament held near Hythe, which heard appeals from the minor courts of each port and beyond which there lay an appeal to the Court of King's Bench. Over this he still in theory presides, as well as over his Admiralty Court; he is, moreover, the Governor of Dover Castle and the nominator of all Justices of the Peace for the liberties of the Cinque Ports. Below the Shepway come two courts—the Court of Brotherhood, composed of the mayors of the seven chief towns and a number of jurats and freemen from each; and the Court of Guestling, containing, in addition, the mayors, bailiffs, and representatives of the corporate members. These conducted all the business relating to the supply of ships. For, in return

(1) Obligations of the Cinque Ports.

for the privileges involved in this organization, each member of the corporation was bound to furnish a fixed number of ships and men to serve the king, without pay, for fifteen days in each year. In the thirteenth and fourteenth centuries this liability had become fixed at fifty-seven ships, of which Dover provided the lion's share of twenty. It is probable that, until the formation of a royal navy under the Tudors, the contingent from the Cinque Ports formed the nucleus of any English force upon the sea, and that for some time later it continued to be an appreciable element in all naval armaments.

(2) Impressment
of merchant
ships.

But the force of the Cinque Ports alone does not account for the large number of ships mentioned as taking part in all early English naval warfare. King John is said to have equipped a fleet of 500 ships; Edward III won his victory at Sluys (1340) with a fleet of 300; Henry V transported his army to France in no less than 1,500 vessels. Indeed, although no other ports seem to have owed definite sea-service to the Crown, yet they were always liable, in time of war, to have their (2) *shipping put in requisition*, whether by hiring or impressment, for the needs of the state. By this means, until the formation of an adequate royal navy, first the contingent of the Cinque Ports and then the scanty ships of the navy itself were supplemented. It was, no doubt, largely for this reason that from the time of Edward III onwards much trouble was taken by the king to encourage merchant shipping. Edward followed his father in proclaiming himself 'Sovereign of the sea,' and endeavoured, for the protection of commerce from pirates, to organize some form of fleets sailing under convoy of ships of war. Under Richard II the first Navigation Act was passed (1381) with the desire of encouraging English shipping by giving to home merchants a monopoly of the carrying trade. Henry IV and Henry VI appointed guardians for the coast. Henry V built a few large ships, and invited the merchants to imitate him. Edward IV began the system of commercial treaties with foreign nations. All the chief requisites of ship-building, such as timber and hemp, were carefully guarded from waste, and their cultivation enjoined. Nor was the *manning of the fleet* a difficult task. Everything was done by the legislature for the development of the English fisheries, because they were regarded as the best

school for the training of seamen. Indeed, the Parliament of Edward VI went so far as to enforce (1548) what has been styled a 'Political Lent',¹ or the eating of fish on so many days in each week, in order to create a demand which the Reformation had done much to destroy. The statute was re-enacted by both Elizabeth and James I, the legislature on all three occasions carefully guarding itself against any supposed religious object in the enactment. The seamen so trained were liable to be pressed for the royal service ; but their engagement only lasted for the term of the war in hand. This matter of the impressment of seafaring men on the outbreak of a war has been the subject of many statutes from the days of Richard II down to the time of George III, and of one judicial argument in the reign of Charles II (1676). In every case its legality has been placed beyond dispute, and indeed the Crimean War was the first occasion on which the fleet was manned without recourse to impressment. The formation of a *naval reserve* will probably prevent the employment of any such measure in the future. Early in the eighteenth century, if not before, suggestions and attempts were made for the registration of all seafaring men who could be summoned to serve in case of need ; but no system was set on foot until 1859, when a naval reserve was formed of those officers and men of the mercantile marine and of fishermen who are willing, in consideration of a small retaining pay, to undergo a certain number of days' annual training on board a war-ship or at a naval battery. These, together with the coastguard, the seaman pensioner reserve, and the royal naval artillery volunteers, form a body of over 40,000 men who are at the disposal of the Admiralty in the event of war. The two former bodies consist of professional sailors who have served a term in the royal navy ; the last are the naval counterpart of the army volunteers. Ships, as well as men, are at the disposal of the government in case of need, and since about the beginning of the present reign, either by contract or by register, the Admiralty have had an option, which they have not been slow to use, of engaging a certain number of suitable vessels for the service of transport or other warlike need.

The foundation of the royal navy has been variously attributed to Ælfred, John, Edward III, and Henry V. But the

¹ Cunningham, *Eng. Ind. and Commerce*, i. 443.

efforts of none of these sovereigns in this direction were permanent. Both Richard I for his crusade of 1190, and John for his contest with Louis of France and the barons, acquired royal vessels in contrast to the contingent of the Cinque Ports, and manned them with mercenaries mostly of English blood: and Henry V built a fleet which the neglect of his successor suffered to decay. All the earliest efforts of the executive seem to have been devoted to the provision of an organization which could be brought into effectual use in time of war without burdening the Crown with the expenses of a permanent fleet. But until the fourteenth century there was no permanent organization for naval affairs, and commanders were appointed whenever it was necessary to collect a fleet. The nearest approach to an organization was that of the officers of the Cinque Ports. But in 1306 Edward I, having instituted a system of coastguard, divided up the coast between three admirals, for whom his grandson substituted one Lord High Admiral (1360). It was, perhaps, the establishment of this organization which caused Edward II to claim for the English king the dominion of the sea, a position to which Edward III's victory at Sluys for a time gave some valid claim. Further, Richard I had issued ordinances for the administration of his crusading fleet; but it is the regulations of Henry V which form the origin and basis of the present Admiralty law. It is to the early days of the Tudors that we must ascribe the real beginning of a (3) *permanent royal navy*. Henry VIII established the dockyards at Deptford, Woolwich, and Portsmouth, and appointed commissioners to superintend the civil part of the naval administration. But the ships which he and his successors maintained, were manned by the old methods as occasion required, and no permanent body of officers or men was maintained in time of peace. The exigencies of the Commonwealth caused the formation of a standing fleet, as well as a standing army; and the excellence of the material at the disposal of the government was shown by the success of the Commonwealth in its contest with the Dutch, who then possessed the finest navy in the world. With the reign of Charles II the royal navy becomes a permanent institution of the country. The exertion of the Lord High Admiral, the Duke of York (afterwards James II), and Samuel Pepys as

(3) Voluntary enlistment.

Secretary to the Admiralty, resulted in the establishment for the first time of a system of half-pay by which a permanent staff of officers and men was retained in time of peace. To the same period is to be ascribed the first parliamentary recognition of the navy by a vote for its maintenance and by a provision for its discipline under which the first Articles of War for the navy were promulgated. These, with amendments, are embodied in the Naval Discipline Act, which since 1866 permanently provides for the navy, as the Mutiny Act and Army Act have over the same period provided for the army. To the same persons is due the organization of the Admiralty in four departments. On the death of Queen Anne's husband, Prince George of Denmark, in 1708 the office of Lord High Admiral was replaced by the Admiralty Board, and was only revived in 1827, when it was held for a short time by the Duke of Clarence, afterwards William IV. The Navy Board, Victualling Board, and Treasurer of the Navy represented respectively the professional, the commissariat, and the financial duties in connexion with the naval organization of the country. In 1832 the two boards were abolished, and in 1835 the office of treasurer followed. The whole work is now done by the Admiralty Board, consisting of a First Lord who, as a cabinet minister, is supreme, four naval lords, a financial and a parliamentary secretary,—all of whom change with the government,—and a permanent secretary. The First Lord alone is responsible for all that is done, and he apportions the business among the members of the board. But, unlike the Secretary of State for War, the Admiralty Board is jointly at the head of the navy, and the First Lord has no necessary professional adviser in the position occupied by the Commander-in-Chief towards the War Office.

§ 71. Such are the most important methods by which individual liberty has from time to time been imperilled or violated in the course of English history. Others, such as the undue extension or the indefinite interpretation of the law of treason, are dealt with elsewhere. In conclusion of this portion of the subject, the fulness as well as the limitations of this individual liberty may be illustrated by the history of the practices of (a) the presentation of public *petitions*, (b) the holding of public *meetings*, (c) the formation of public *associations*.

Popular
methods
of influ-
encing the
adminis-
tration.

(1) Peti-
tions.

ciations. Their appositeness consists in the fact that *it is by these three methods that the nation outside Parliament endeavours to influence the executive in some particular direction.* After the establishment of Parliament the subjects of petitions seem to have been confined to the redress of private grievances. The exciting political events which led up to the Great Rebellion began the modern system of petitions, whether addressed to the king or to Parliament, on matters of public interest. The demonstrations by which the presentation of some of these petitions was accompanied, led immediately after the Restoration (1661) to the passing of an Act against tumultuous petitions (13 Car. II, c. 5), by which no petition to the Crown or either house of Parliament for the alteration of matters established by law in Church and State should bear more than twenty signatures without the approving cognizance of a certain number of specified officials; and no petition should be presented by a body of more than ten persons. In 1680, when the political feeling in the country showed itself in the presentation of numerous petitions to the Crown for the meeting of Parliament, the petitioners were by a royal proclamation threatened with the penalties of the Act and counter-petitions were encouraged from those who abhorred the disloyal designs which underlay the wish for the calling of Parliament. Such a use of the Statute inhibited all petitions except such as might be pleasing to the Crown; and accordingly, the Bill of Rights after the Revolution declared that 'the subject has a right to petition, and that all commitments and prosecutions for such petitions are illegal.' But the Revolution was the triumph of Parliament and of the narrow oligarchy then represented in the House. Whigs and Tories alike resented, as far as they could, the attempt to exercise any outside influence upon their deliberations; and, although it was some time before Place Bills put a check on the power of the Crown, the Commons did not scruple to use their privileges for the purpose of excluding the influence of the people from the so-called house of popular representatives. The most striking instance of the use of this power was the case of the *Kentish Petitioners* in 1701. The Tory ministry in power was withholding supplies for a war begun by the Whigs. The grand jury and many of the freeholders of Kent, indignant at this

unpatriotic conduct, petitioned that the loyal addresses of Parliament might be turned into bills of supply. The petition was with difficulty presented; it was voted scandalous, insolent, and seditious; and five of the petitioners were imprisoned until the end of the session. It is small wonder, then, that general petitions were little used; for, every one unacceptable to the majority, such as the petitions from the City of London in 1690 and from a number of clergy, lawyers, and doctors in 1772 for a relaxation of some of the religious disabilities of the day, were summarily rejected. It almost seems a judgment on the action of the Commons that the first question on which an extended system of petitioning was invoked, was that of parliamentary reform. In 1779 the freeholders of Yorkshire, to the number of 8,000, began a movement which spread into many parts of the country and produced forty petitions in that year, and three years afterwards fifty more, all concerned with the reform of the House of Commons. It was the movements for the abolition of the slave trade, beginning with a petition of the Quakers in 1782 and continuing until the Emancipation Act of 1833, which, in the number of petitions presented, first rivalled the exertions of modern days: but it was not until towards the end of George IV's reign that the principle of attempting to influence Parliament through the carefully expressed manifestoes of men of ability and local influence, gave way to the present democratic practice of counting heads, and produced those monster petitions whose influence has been so largely discounted by the frauds which were employed in their concoction. Of these the most celebrated was that of the Chartists in 1848, which purported to bear no less than five million signatures. It would seem as if the extension of the franchise had naturally removed the object of petitions, and that their use would therefore cease: for they afforded one of the few means by which the unenfranchised classes could express their opinions on public matters. However that may be, the tide of petitions has flowed steadily on throughout this century, reaching for many years in succession an annual average of considerably more than ten thousand. The liberty allowed to petitioners is so unrestrained that the House of Commons practically permits them 'to express anything short of an intention to break the law or a contempt for the body to

¹ Anson,
*Law and
Custom of
Const. i.*
350.

which they appeal for redress¹. This enormous development in the use of petitions soon entailed a change in the procedure of the House of Commons. Hitherto the presentation of a petition was followed by a debate on its contents. A continuation of this practice would have absorbed the whole time of the House. It was accordingly resolved by standing orders of 1842 and 1853 that, while a debate might be raised on any petition which disclosed matters requiring an immediate remedy, in ordinary cases the member presenting it should limit himself to a statement of its contents, the places or persons whence it emanates, and the number of signatures attached.

(2) Meet-
ings, and
(3) Asso-
ciations.

Petitions are in many cases the outcome of *public meetings* which are often held for the purpose by *political associations*. All three forms of expressing and crystallizing public opinion took their rise about the same period. The oligarchical Parliament of the eighteenth century, which used every means to shut out the influence of the people, was bound occasionally to bend before the storm of public opinion which was marshalled in the early part of the century by the newspaper press. Thus, in 1733 Walpole, although commanding a majority in Parliament, was forced to withdraw his excise scheme in deference to the clamours of the people; in 1754 Parliament was intimidated into a repeal of the Act for the naturalization of the Jews, which had been passed a short while before; and in 1763 Bute was by the same means driven into an involuntary retirement. It was, however, with the agitation produced by the case of Wilkes (1768) and with the interference of the Commons with the rights of electors in the Middlesex election (1770), that the real history of public meetings and associations begins. Of these latter some of the most important were the Protestant Association formed for the repeal of the Catholic Relief Act of 1778 and leading to the Gordon Riots in 1780; the Slave Trade Association for the abolition of the slave trade, and the direct predecessor of the present Anti-Slavery Society; the Revolution Society to commemorate the Revolution of 1688; the Society for supporting the Bill of Rights, which was the outcome of the Middlesex election; the Society for Constitutional Information formed in 1780 to forward the cause of Parliamentary Reform;

and the London Corresponding Society and the Society of the Friends of the People, which were both the result of the early movements of the French Revolution. The repressive measures of the government from 1792 onwards drove many of these societies to secrecy, and 'association degenerated into conspiracy.' This was met by the two bills to prevent seditious meetings (1795) and to suppress by name certain societies, including the extreme London Corresponding Society, which gave its name to the Act (1799). These were for the time effective; but the renewed agitation, chiefly from social causes, which followed the cessation of war, was again met by a proclamation against seditious meetings enforced in what is known as the 'Manchester Massacre' (August, 1819), and by one of the 'Six Acts' which prohibited any meeting of more than fifty persons without notice and permission. The operation of this, however, was limited to five years. But the disgust occasioned by the Cato Street conspiracy (1820) showed that all serious danger had passed away. In 1824 the repeal of the Combination Laws, which had practically forbidden all associations of working men for the purpose of securing better wages, did much to satisfy the superior members of the class which had contributed most, and perhaps most justly, to the social discontent of the previous period. The extraordinary success, on the one side, attained by the Catholic Association in the Catholic Emancipation Act of 1829; by the widespread agitation in favour of parliamentary reform in the Act of 1832; and by the Anti-Corn-Law League in 1846, together with the failure of O'Connell's agitation in favour of the repeal of the Irish Union (1830-1844) and of the Chartist Movement (1838-1848), showed both the impossibility of successfully coping by repressive measures with movements that command a widespread sympathy, and the failure which of necessity attends an organization which appeals to one class or section of the community alone. The laws which govern the formation of political associations relate chiefly to the demand from their members of oaths or engagements unsanctioned by the law. The right of public meeting is limited by such laws as regulate individual liberty of speech and person. Thus, all meetings are legal until some illegal act has been committed; while no magistrate or official has any

power to prohibit a meeting by proclamation merely because he is aware that the holding of it will lead to a breach of the peace. This merely affords another illustration of the truth that the English law only takes account of a man's actions and not of his intentions. The absence of any power to take cognizance of the latter is no doubt in many ways a weakness in the executive ; but it finds ample compensation in the increased security which is thereby given to the liberty of the individual.

CHAPTER X.

REVENUE AND TAXATION.

§ 72. IT has already been shown what an important part has been played by questions of money in the development of the English Constitution. For, it was the king's desire to obtain grants from his subjects in the most convenient manner possible that led to the first summons of representatives of the Commons to Parliament; and it was the constant necessities of the king that gave the Commons the opportunity of gradually establishing the dependence of the Crown upon themselves not only in questions connected with grants of money, but in all other matters whatsoever. But it is to be carefully borne in mind that there existed at first a great distinction between revenue and taxation. The king was provided with regular means, whether in the shape of lands or of privileges convertible into money, by which the royal dignity could be sustained and the ordinary functions of government carried on. The earliest attempts at taxation are connected with the invasions of the Danes, and take the shape of special levies to meet special and temporary emergencies. Together with the increase of the necessary functions of government comes a corresponding increase in the need for extra supplies; but it is only very gradually that the grantors discover that the duty of assent, carrying with it of necessity the opportunity of refusal, has placed a most effective weapon in their hands. The constant cry of mediaeval times 'that the king should live of his own' (*que notre seigneur le roi vive de soen*), must not, however, be misconstrued. Not only did the ever-growing activity of government make it more and more impossible to meet increasing expenses with a stationary or even diminishing

¹ Stubbs,
Const.
Hist.
§ 274.

revenue; but 'no patriotic statesman dreamed of dispensing altogether with the taxation which gave the nation an unvarying hold on the king whether he were good or bad'.¹ The desire which underlay the demand was no more than that in time of peace the revenue should suffice for the ordinary expenditure of government. Indeed, so long as the personal government of the monarch lasted, Parliament clung to the view that taxation was an exceptional method of supplying the needs of administration, perhaps chiefly called for by the advisability of meeting each year the expenses of that year. But experience proved that taxation must be annual; and while Parliament used the necessity of an annual grant as a means of keeping a hold upon the course of government, the superior facilities for borrowing enabled the Crown to meet extraordinary expenditure by loans. Thus, whereas during the time of personal government, ordinary expenses were met by the revenue and extraordinary charges by intermittent taxation, the establishment of the omnipotence of Parliament at the Revolution of 1688 inaugurated an era in which the ordinary expenses of government were met by regular taxes annually granted; while for extraordinary burdens government had recourse to loans, the interest on which became an annual charge, and posterity was thus burdened with a large share in the payment of expenses, with the specious pretext that they were incurred partly in the interests of future generations. It is, then, not only possible, but advisable, in treating of the expenses of the maintenance of government in the past, to deal separately with the royal revenue and the sources and principles of taxation.

The Crown
Lands.

The ancient hereditary REVENUES of the Crown may be grouped under two heads, (1) *land*, which included rents and dues of various kinds; (2) *the exercise of the royal prerogative*, which took the shape of numerous fees and fines. To these were from time to time added others, such as (3) *the feudal dues* after the Norman Conquest, (4) *the Post Office* at the Restoration, and (5) *the hereditary revenues of Scotland and Ireland*. Of these by far the most important throughout history have been the *Crown Lands*. The rights of the king over land before the Norman Conquest were of three kinds. He possessed (a) his own private estate in the shape either of *bocland* of which he could dispose by will; of *laenland*, of

which he had a temporary lease ; or of folkland, which the waning recognition of family rights enabled him to convert into bocland ; and (b) the estates of the Crown as such, with which he could only deal by connivance of the Witan. At the Norman Conquest the whole country in theory passed into the estate of the Crown. Thus the private lands of the individual king were also merged in the royal demesne. This consisted of those estates which had not been in theory granted away by the Crown, and which, in the record of Domesday, comprised over 1,400 manors. The profits from them consisted of rents in money or in kind, and represented the old feorm-fultum or right enjoyed by the early English monarchs, of sustenance for themselves and their court on their progresses through the land. Up to the time of Henry I the payments under this head continued partly to be made in kind ; but in the course of that reign the commutation for money was completed. Thus the king of Anglo-Saxon times may be regarded as a great landowner, moving from estate to estate and living successively on the profits supplemented by gifts from the surrounding inhabitants. The Norman and Plantagenet kings were equally ubiquitous ; but their income was taken largely in money, and the expenses of travelling were met by the exertion of those powers of the royal prerogative which became so hateful under the name of purveyance and preemption. These will be mentioned later. For the present it must be remarked that, as soon as a discrimination begins to be made between items of expenditure, it seems to be a recognized principle that *the personal expenditure of the court should be met out of the revenues from the royal demesne lands*. And it would seem at first sight that this must have provided a more than adequate source. For not only did feudalism supply, in the rules of escheat and forfeiture, a constant means of replenishing, if not of extending, the demesne lands of the Crown ; but from time to time individual kings made large additions. Thus, Henry IV brought with him the Lancastrian inheritance which, by the aid of Acts of Parliament on the accession of almost each new sovereign, has even to the present day remained apart from the general estate of the Crown. Henry V by his confiscation of the lands of those monastic houses which were connected with foreign orders (alien priories, as they

were called), afforded a valuable precedent both for Wolsey's destruction of some of the smaller monasteries and more especially for the sweeping act of Henry VIII and his rapacious minister, Thomas Cromwell. But fortunately for the liberties of the nation the kings gave away with one hand what they had grasped with the other. This had been the case almost from the first. From the time of Stephen onwards the accumulations and confiscations of the first three Norman kings were bestowed with lavish bounty on the royal favourites. As a consequence, the royal demesne diminished rather than increased, and, meanwhile, the expenses which it was intended to cover continually grew. Under Edward I the maintenance of the royal household cost £15,000. Under Edward III £25,000 was devoted to this charge out of a total expenditure of £150,000. Under Richard II, with a slightly diminished revenue, the amount rose to £45,000, and yet the king severely resented the remonstrance which was in consequence presented by the Commons. Under Henry IV the Lancastrian inheritance was whittled away in bribes to the great nobles who had recognized his title; and while the general revenue still declined, the court absorbed more than £50,000. It is not difficult to understand the constantly recurring cry that 'the king should live of his own.' And the reason of his inability to do so was rightly understood: for in all the popular risings of the Lancastrian and Yorkist times, such as those of the Percies in 1403, of Cade in 1450, and of Robin of Redesdale in 1469, this demand was coupled with complaints against the royal councillors for mismanaging and misappropriating the royal revenues.

The Crown did not seem capable of protecting itself in the matter, and several devices were resorted to in the interests of the true dignity and independence of the sovereign. It was not that the country grudged supplies to its rulers or wished to interfere unduly with their actions. A king who ministered to the glory of the land, might go a long way in the direction of unconstitutional taxation before any serious dissatisfaction would arise. The complaints against Henry III, Edward II and Richard II were far more vehement than even against the wasteful Edward III. But the people were persuaded that the Crown was rich; and, if in time of peace

the means ordinarily to hand did not suffice to cover the expenses of government, the blame was laid on the extravagance of the royal household and the rapacity of the ministers and favourites, whom there was no means of checking by a proper audit. Thus 'the extravagance of the court was really only . . . a colourable ground of complaint against an otherwise intolerable administration'.¹ But the evil was a serious one in itself, and attempts were made to meet it by stringent remedies. Setting aside the various devices, by election, oath, and sale of office, for ensuring the responsibility of ministers in the general conduct of the administration, we may notice (*a*) the numerous attempts at *resumption* of the royal demesne. This was undertaken by so strong a ruler as Henry II, and was insisted on by the barons together with the banishment of Henry III's foreign favourites. The first definite action of Parliament in this direction was in 1450, when, in order to recruit the slender resources of the Crown, an Act of Resumption annulled all grants of royal demesne made since the beginning of the current reign. This was repeated in 1455 and four times under Edward IV; but, owing to the number of exemptions allowed from the operation of the Acts, the general effect seems to have been small. A more important, though not for some time more successful, method of restraint had for its object (*b*) the *limitation* of the king's power of alienating the royal revenues in the future. The first attempt at this is found in the Ordinances of 1311 which forbade any gift of land or crown property of any kind without consent of the Ordainers. The barons went even further, and, in 1315, put the king on an allowance of £10 a day. Edward III's cunning device of promoting and rewarding his favourites with the apparent approval of Parliament, prevented any attempt at regulation until the last year of his reign; but the projected reform of the Good Parliament was abandoned on the accession of Richard II; and, despite the appointment of numerous commissions of reform in Parliament, nothing was done in the new reign. Among the charges against Richard was one of alienating the royal estates; and on the accession of Henry IV several legislative attempts were made to check the power of the Crown in this respect. But these failed of effect; for the courtiers made their own arrangements with

¹ Stubbs,
Const.
Hist. § 285.

the king, and the grants were filled with 'non obstante' clauses. But as the numerous forfeitures and escheats had in earlier days saved the Crown from complete poverty, so now the same result was produced by the new methods of raising revenue through participation in trade and the revival of obsolete royal and feudal rights to which Edward IV and Henry VII had recourse, and more especially by the enormous confiscation of monastic property. But the lavish and probably politic grants of Henry VIII, followed by the frequent sales, profitable under Queen Elizabeth and necessary under Charles I, together with the prodigality of Charles II, left the Crown as poor as ever. At length William III's unnecessary generosity to his personal friends seemed to call for the interference of Parliament; and under his successor it was provided that no future lease of crown land should be granted for more than forty-one years or the duration of three lives. Had this rule been put in force immediately after the Restoration, the entire Civil List of Queen Anne might have been provided out of the land revenues of the Crown.

Fees and
Fines.

§ 73. Together with extensive landed possessions the Crown enjoyed from the earliest times the produce of a number of *fees and fines levied in exercise of the royal prerogative*. Among such was the king's share, as guardian of the peace, in the *profits of justice* in the local courts. In early days these, together with the rents of the royal demesne lands within the shire, formed the *Ferm* of the shire, a lump sum with which the sheriff compounded for these sources of royal income. In other words, the shire was let to the sheriff at a fixed rate, and it was out of these sources that he recouped himself. There was, besides, one class of fees for justice which the king claimed in their entirety. These were such as arose from that class of cases which were specially designated the *Pleas of the Crown*, among which the payments for murder and presentment of Englishry long formed a conspicuous feature. Under

¹ *Sel. Chart.* the head of fines may be enumerated the early *fyrðwite*¹ for non-attendance at the mustering of the local militia, and *ofer-*

² *Ibid.* *hyrnes*², for contempt of court; while with the Normans there was introduced an extensive system of composition for offences which left the offender at the mercy of the king. Under the same general head may be ranged the numerous payments for

appointment to offices which amounted to a sale or at best a fine to ensure the good behaviour of the holder, and the grant of privileges and exemptions of all kinds, such as charters to towns, the tolls of markets, fords and ports; while the sum total was swollen by the addition of such minor and miscellaneous profits as would arise from the produce of wrecks, the claim to treasure trove, the right to work mines or at least to a royalty on their proceeds.

The majority of these rights were enjoyed by the Crown without a protest from the people. There was, however, one class of these privileges which was especially obnoxious to the people. These were comprised under the general term *Purveyance*, and were connected with the commissariat of the Court on its journeys through the country. Originally, this duty of *hospitium* had been discharged by voluntary gifts to the chief on his journeys; but the constant demands on this score may have caused such commutation of the liability as is described in the frequent claim to a *firma unius noctis*. Yet no commutation could deprive the king of his undefined right of exaction to meet unexpected necessities. The wants of the Court as it moved, were supplied by purveyors who would occasionally obtain what they needed by simple seizure or *caption*, but more commonly by *preemption* or compulsory purchase at prices fixed by the purveyors themselves. The value and consequent oppressiveness of the right alike are proved by the constant legislation by which the Commons in vain strove to check its exercise. In the first Parliament of James I it was declared that there were thirty-six statutes in restraint of the right. Of these no less than ten were passed under Edward III, the extravagance and ubiquitous character of whose Court drove the Commons to most strenuous measures. By the last of these in 1362 the use of purveyance was limited to the personal wants of the king and queen¹. But all the evils of the system still continued; and in the time of the Tudors it was placed under the management of the Board of Green Cloth and was enforced by imprisonment.

The future history of purveyance is bound up with that of the *Feudal Dues*. We have seen that even before the Norman Conquest landowners were liable to the payment of the Heriot and to the exercise by their lord of all that was implied in the

Purvey-
ance.

¹ 36 Edw.
III, c. 2.

Feudal
Dues.

rights of wardship and of marriage. After the Conquest the Heriot gave way to the Relief, which represented the feudal idea of a re-grant from the lord; the rights of wardship and marriage were strained till they lost all original meaning, and the feudal aids were added to the liabilities of the tenant. The history of the gradual fixing of the relief has been already traced. It has also been shown that the levy of feudal aids was early limited to three occasions. But that attempts were made by the kings to take such aids on other pretexts than these three, is proved by the twelfth clause of Magna Carta, which forbids any aid other than the three usual aids to be levied without consent of the Commune Concilium of the kingdom, and at the same time enjoins that even these three

¹ *Sel. Chart.* should be reasonable¹. The vagueness of this epithet was p. 298.

corrected in the Statute of Westminster I (1275), which fixed the aids exacted on the occasion of the knighting of a son and the marriage of a daughter at twenty shillings for each knight's fee. It was obvious that the aid for a lord's ransom must depend on the amount of the whole sum demanded. In the *Confirmatio Cartarum* the king was made to repeat the promise of the Charter itself; and a more stringent provision was embodied in a statute of 1340 to the effect that the various classes of the community should not 'be from henceforth charged nor grieved to make any aid or to sustain charge if it be

² 14 Edw. not by common assent of . . . Parliament². But whatever may III, st. 2. have been the view of the Commons, the king did not regard it as within their power, if indeed it was within their meaning, to curb his feudal rights; for not only did he exact in 1346 an aid for the knighting of his eldest son, but even, in direct defiance of the Statute of Westminster I, he took it at twice the usual rate. But the feudal aids were passing away together with scutage and tallage as methods of raising money. For more than a century and a half after the Black Prince no king's eldest son was knighted in the lifetime of his father, while on the marriage of Henry IV's eldest daughter to the Duke of Bavaria no claim to a feudal aid was made. They were, however, useful weapons in the hands of a rapacious king for obtaining extra grants from his subjects. For this purpose they were revived by Henry VII, who, although his eldest son was just dead and his eldest daughter Margaret had been married

some years before to the king of Scotland, in 1503 levied by consent of Parliament an aid which produced more than £30,000, and which was paid by socage and copyhold tenants as well as by those of knightly rank. The other feudal payments had continued to be exacted, and brought in an appreciable annual income to the Crown. Henry VIII, acting on the hint given by his father, systematized all the feudal rights of the Crown under a special Court of Wards and Liveries. It did not matter that the feudal army had completely disappeared and that with it had gone every reason for the maintenance and work of such a Court. But other influences were at work to destroy a system which was at once antiquated and obnoxious. The permanent revenue of the Crown was seriously reduced by the fall in the value of silver, which followed the opening of the American mines. The financiers of the seventeenth century had, therefore, to discover some source of revenue which would yield a regular income sufficient to meet the continually growing needs of government. The first which occurred to them was a commutation of the old royal and feudal rights of the Crown which were so lucrative and yet so unmeaning. These rights included purveyance and the feudal dues, each of which needed separate treatment. In the case of purveyance the Commons desired merely to do away with the illegal extensions of the system ; whereas in the case of the feudal dues they desired to destroy a whole system which, while it lasted, was strictly within the letter of the law. The first debate on the matter in the first Parliament of James I was quashed by the Lords, who denied that the feudal rights concerned any but themselves. But in 1610 the king's necessities caused a renewal of negotiations which ended in an agreement for the surrender of all the royal feudal claims, including purveyance, in return for a fixed sum of £200,000 a year. But before the agreement became law both parties had changed their minds. The king thought that he would not gain much by the bargain, while the Commons feared the addition of so large a sum to the royal revenue. Consequently, the Great Contract, as the bargain was called, fell through, and it was only at the Restoration, by steps already noted, that feudal tenure, with all that it involved in the shape of feudal incidents, together with purveyance and its accompaniment

preemption, were finally abolished, and other means were found of increasing the royal revenues.

Substitutes
for feudal
dues.
(a) Excise
on beer.

The first of these means was an *excise on beer and other liquors*, which was avowedly intended to take the place of the surrendered royal and feudal dues. It has been usual to stigmatize the selfishness of the landowners who thus substituted for the feudal dues which fell only on themselves, a class of taxes which fell upon the general public. But apart from the political inadvisability of alienating the landowning interest from the newly established government, it is to be considered that the tax which was at first projected, a general land-tax, would have been offensive to the socage and copyhold tenants who had not been liable for feudal dues; while a tax levied under a different name from those lands alone which had paid feudal charges, would have borne unfairly on those who had bought the lands under the Commonwealth on the understanding that all such liabilities had been abolished. The general history of Excise will be dealt with under the head of Taxation. Here it shall be merely said that this excise was made part of the hereditary revenue of the Crown; in 1736 it was commuted for a fixed sum of £70,000, and at the accession of George III it was merged in the general revenue of the country.

(b) Post
Office.

To this excise was added in 1663 the revenues of the *Post Office*. This had been set on foot by James I for the convenience of English merchants corresponding with foreign countries, and was made available by Charles I (1635) for the transmission of internal correspondence in England and Scotland. During the Commonwealth it became a source of revenue, and in 1659 was farmed out for £14,000. At the Restoration it was organized by statute and obtained the monopoly of letter carrying for hire, while the profits were made part of the hereditary revenues of the Crown. It was at first farmed out for £21,500, but the profits rapidly increased. At the end of William III's reign it brought in £75,000; under Anne and George I this had risen to over £90,000; and while in 1710 the proceeds were divided between the king's Civil List and general expenditure, after 1760 the whole was merged under the latter head.

§ 74. Such were the hereditary revenues of the Crown after

the Restoration. To these were added certain grants of the nature of taxes for the life of the reigning king, such as the old Tonnage and Poundage now reorganized, and a new temporary excise on wine at the same rate as the hereditary excise.

With the proceeds of this hereditary revenue and these permanent taxes the king was still expected to keep up the royal state, the civil government, and all that was necessary for the defence of the kingdom in time of peace. This in fact was the true Civil List. The items under this head at the disposal of Charles I had realized an average annual sum of one million pounds, and experience had proved it to be insufficient. It was calculated that the sources set apart at the Restoration would raise the sum total to £1,200,000. At first they did not yield so much; but before the end of his reign, owing to the improvement in trade and a better management of the customs, they so far passed the estimates that James II enjoyed from these sources an average income of £1,500,000. But the use made by Charles II and his brother of the money granted to them caused Parliament, after the Revolution and practically for the first time, to attempt some definite limitation to the personal expenditure of the Crown. Thus the sources of income set apart at the accession of William and Mary were calculated to produce £1,200,000; and of this the hereditary revenues and the excise duties, together estimated at £700,000, were appropriated to the civil expenditure of the Crown. This included not only the personal expenses of the Court, but the salaries of ambassadors, judges, and the civil service generally, together with all current pensions. It seems, however, that the sovereigns, being thus circumscribed in their revenue, refused to consider themselves obliged to restrain their expenditure within the amount appropriated to the Civil List. Thus, down to the accession of George II these sources realized an average of £700,000 a year; but both Anne and George I respectively applied to Parliament to discharge more than one million pounds of debts. The Civil List of George II was guaranteed at a minimum amount of £800,000, for any deficiency in the usual sources was to be met by a parliamentary grant; but even with this increase Parliament was called on to release the king of a debt of £450,000. But with the accession of George III Parliament for the first time

The
modern
Civil List.

obtained acknowledgment of its power of direct control over the personal expenditure of the Crown. Hitherto, since the Revolution, Parliament had guaranteed to the Crown certain branches of revenue which were calculated to produce an adequate income. Now George III surrendered the crown lands, the excise, and the Post Office in return for a definite sum of £800,000 a year, which in 1777 was raised to £900,000. But out of this were still paid the salaries of ambassadors, judges, and civil servants, annuities to members of the royal family, and pensions for public services. At the same time, there remained at the absolute disposal of the Crown certain other sources of revenue such as the hereditary revenues of Scotland and Ireland. Yet this did not preclude applications from time to time to Parliament for the discharge of debts which during the reign amounted to £3,500,000. Future reform was in two directions. On the one side, most of those sources of revenue which remained beyond the control of Parliament were surrendered by the Crown; on the other side, the sum voted by Parliament was gradually relieved of all burdens except those immediately connected with the maintenance of the personal dignity of the monarch. The first step in this direction was taken by Lord Rockingham's Act of 1782, by which the Civil List was divided into eight classes and the expenditure was to be according to a prescribed order. It was a natural step to transfer such of these classes as did not concern the personal estate of the Crown, to the Consolidated Fund out of which, since 1787, the expenses of the civil government of the country are defrayed. This was of course accompanied by a pro tanto diminution of the sum voted to the Crown. Thus, in 1816 various payments to members of the royal family were so disposed of. Again, on the accession of William IV, the vote of a smaller Civil List of £510,000 was accompanied by the withdrawal of nearly all public charges except a pension list of £75,000 and a sum for secret service of £23,000. At the same time, George IV's surrender of the hereditary revenues of Ireland and of all that the Crown still kept under the same title from England, was followed by William IV's surrender of the hereditary revenues of Scotland and some smaller sources of independent income. Finally, on the accession of the present Queen, the Civil List

was further diminished to £385,000 distributed under six heads of expenditure; and the sole extra expense with which it is charged is a diminished pension list from which fresh annual grants may be made of no more than £1,200. The sole extraneous source of income at the disposal of the sovereign is the Duchy of Lancaster, which has been jealously kept apart from the crown lands. This now yields about £45,000 a year. At the same time, it is noteworthy that the crown lands themselves, which at the time of their surrender produced little more than £6,000, now add no less than £400,000 to the revenue of the country. It is probably no exaggeration to say that these apparent encroachments, even upon the private expenditure of the Crown, have in reality added to its true dignity and conciliated more than ever the confidence and affections of the people.

§ 75. It has been said that the earliest idea of TAXATION was that of a special levy to meet a particular emergency. Early forms of taxation. Opportunity for this was first afforded by the invasions of the Danes; and the earliest levies of special aids in this connexion take one of two forms. They were either *Shipgeld* for the purpose of raising a fleet to cope with the invaders; or *Danegeld* with which to buy off their hostility. The latter was unfortunately by far the more common. It was levied first in 991 by Æthelred at the suggestion of Archbishop Sigeric and with consent of the Witan, and then at intervals up to the reign of Eadward the Confessor by whom it was abolished. Shipgeld does not appear again, except in doubtful instances, until the celebrated shipmoney levy of Charles I. But Danegeld was revived by William I in 1084, and remained a frequent exaction for about eighty years. It was a land-tax taken, under the Anglo-Saxons, at the rate of two shillings on every hide. William I not only robbed it of its meaning by making it a regular levy, but trebled the amount which in future levies was generally taken at six shillings on the hide. The altered position occupied by the towns after the Norman Conquest seems to have led to a special levy, corresponding in incidence and amount to that taken from ordinary landowners, but known by the name of *Auxilium burgi*. Now, the history of mediaeval rights and claims is very largely an enumeration of exemptions. Thus, monasteries and all persons employed

in the king's service seem to have been free from the necessity of payment of Danegeld. And yet the tax was most unpopular; for the sheriff after the Norman Conquest farmed it together with the royal claims which went to make up the ferm of the shire, and it was out of the Danegeld that he seems to have obtained the chief portion of his profit. Perhaps for this reason, then, soon after the accession of Henry II this tax disappeared, at any rate in name. In 1163 Becket seems for some obscure reason to have led the way in a refusal to contribute, and henceforth the Danegeld is supplanted by a vague levy called *donum* or *auxilium*, which seems to have been raised, like its predecessor, upon the hide. The refusal of Becket, which probably prevented the levy of Danegeld on his own lands, illustrates the feudal theory of taxation. The taxpayer made a voluntary offering to relieve the temporary necessities of his lord, and thus his promise of the tax bound only the individual who made it. Hence all opposition to taxation was at first personal, as taxation was itself in theory personal. It is true that Henry I speaks of 'the aid which my barons gave me' and, in his order for holding the local courts, promises to

¹*Sel. Chart.*
p. 104.

summon them if his necessities require it¹. Thus some form of grant may have been observed; but there is no account of any definite vote of taxes or of a discussion over a money grant until the end of the reign of Richard I. The feudal theory of taxation also involved the necessity of its levy upon land. The basis was the somewhat indefinite hide; and since one, if not the chief, of the objects of Domesday had probably been to obtain a basis for the fair assessment of the Danegeld, in cases of dispute Domesday formed the evidence of the liabilities of an estate.

Changes
under
Henry II.

The reign of Henry II inaugurated new principles in taxation as in so much else. In the *first* place, the exemptions claimed by the Church lands from the liabilities of feudal tenure were met by the levy from them of a commutation for personal service in the form of scutage. *Secondly*, the basis of feudal taxation in general shifted from the hide, which had been common to feudal and national taxation alike, to the more special ratings on the knight's fee; while, under Richard I, even for national levies upon land the hide gave way to the more definite carucate of a hundred acres. *Finally*, the

growing wealth of the country under the strong Norman administration with its many foreign connexions, suggested the accumulated merchandise as a fit subject for taxation. Thus to real was added personal property as contributory to the needs of the state. These changes produced two results. The witness of Domesday had become insufficient as a method of ultimate assessment; and thus, while the feudal taxes were left to the statement of the individual, for personal property and even for real property in the carucage, the returns of the individual payer were liable in cases of doubt or dispute to be submitted to the decision of a small committee or jury of his neighbours. Again, the first departure from the individual theory of taxation was made in the application of special taxes to each separate class of the community. Thus the feudal class, who by the Charter of Henry I had been exempted from every demand except personal service¹ (an exemption, however, which only applied to the levy of special aids and not to the ordinary feudal dues) were brought under contribution by an extension to them or to a large number of their body, of the levy of scutage in lieu of personal service. Again, from all the landowning class would be required the donum, auxilium or carucage which had taken the place of the obnoxious Danegeld, and upon the same principle tallage was levied on all burgage tenants. The application of the principle of class taxation was an important item in constitutional advance; for it encouraged the growth of a system of estates, each responsible for its own particular burden and distinguished by the interests of its own particular class.

Class taxation.

¹*Sel. Chart.* p. 101, § 11.

It has been shown elsewhere that the full number of knights whom a great estate had to furnish, were seldom to be found enfeoffed or provided with the requisite amount of land. For those which were not enfeoffed but remained, in the technical phrase, 'charged on the demesne,' the lord had to provide substitutes. It has been seen that *scutage* may have originally represented the sum paid to a substitute for a knight, and thus the royal demand merely involved a change in the mode of payment—to the king instead of to a substitute—and a possible extension of the system to those who were personally liable for service. In the case of the last class alone, then, could it strictly be said that scutage was a payment

Feudal class.

in lieu of personal service. Now, the antipathy of the kings to the feudal levy as being unwieldy and, from the shortness of its service, useless for foreign expeditions, is apparent from the early days after the Norman Conquest. It seems probable, then, that the custom of scutage was adopted almost from the first; although the earliest traces of it are not to be found until the reign of Henry I, nor the first definite mention until 1156. In that year Henry II, on the occasion of his expedition to Wales, and perhaps, as has been suggested, in imitation of his grandfather, met the unwillingness of the holders of Church lands to supply military service from their fiefs, by the demand that they should supply the king with funds instead, at the rate of twenty shillings on each knight's fee for which service was due. In 1159 the same principle was extended to the lay holders of knights' fees, but only probably to the smaller tenants-in-chief and even then at the option of the individual. The rate of payment was two marks from each knight's fee, and the number compounded for in this manner seems to have been 1,280, a small portion of the whole available amount. The benefits of the exaction were obvious; for it got rid of the useless feudal levy, and it gave the king a sum of money with which he could hire mercenaries for his foreign wars. The rate of scutage seems to have varied from ten shillings, the demand in 1189, to three marks (i.e. forty shillings) from each knight's fee, which latter sum became frequent under Henry III and the usual rate taken under Edward I. Meanwhile, John's exaction of no less than ten scutages for continual abortive expeditions led to the provision in Magna Carta (§ 12) that no scutage should be taken except by leave of the Commune Consilium regni¹. This was to make a commutation for personal service, which had in origin been a mere matter of arrangement between the king and his feudal tenants, into a regular grant of taxation. This was illogical, and consequently in the second reissue of the Charter by the barons under Henry III (1217) it was withdrawn in favour of a provision (§ 44) for taking scutage as it had been taken under Henry II². But with the disuse of the feudal army in favour of other methods of military levy, scutage tended to disappear. In process of time estates had been broken up, and the original liability for knights' fees became

¹ *Sol. Chart.*
p. 298.

² *Ibid.*
p. 347.

divided. The trouble of collecting consequently became greater, while the excuse for it was slighter: at the same time new methods of taxation had been found more productive and less obnoxious to the landowners on whom scutage would have fallen. The result was that, although the liability to scutage was only abolished with the abolition of feudal tenure in 1661, yet there are after the reign of Edward I only two traces of it, in 1322 after Edward II's victory over his rebellious barons at Boroughbridge, when it was taken in the shape of the fines which were imposed on those who had refused to serve in the army which was defeated at Bannockburn; and in 1385 when Richard II in view of an expedition remitted scutage as if it were a tax which he considered the king might still levy, if he chose, when he went to war in person.

It has already been shown that the place of the Danegeld after 1163 was taken by an occasional tax called vaguely *donum* or *auxilium*. It is of course necessary to distinguish this carefully from the three regular feudal auxilia or aids which even by Magna Carta could be taken without any consent of the Commune Consilium. These *dona* were reckoned, like Danegeld, upon the hide. But the hide was a vague measurement; for since it probably comprised only cultivated land, it must have been continually shifting, and the evidence of Domesday must have become increasingly untrustworthy. In 1194, therefore, the place of the hide was taken by the more definite measurement of the carucate or ploughland of 100 acres. Like its predecessors, the new *carucage* was intended to fall on the whole landowning class, and the rate was first fixed at the old amount of two shillings on each carucate¹. But the amount was variable, for in 1198 each carucate paid five shillings² and in 1200 three shillings³. Meanwhile, in 1198 an important change took place in the method of assessment, and for the statement of the individual payer was substituted the evidence on oath of a local jury which had under Henry II been applied in the case of personal property. Carucage may be traced into the early years of Henry III, after which it seems to have disappeared.

It has been said that alongside of the Danegeld from the country was exacted the *auxilium burgi* from the towns. This continued under the more common name of *tallage*, and formed

Land-
owners.

¹ Sel. Chart. p. 254. R.

² Hoveden, iii. 240.

³ Ibid. p. 257.

⁴ Ibid. iv. 46.

⁵ Ibid. p. 272.

⁶ Ibid. iv. 107.

⁷ Ibid. iv. 107.

⁸ Ibid. iv. 107.

⁹ Ibid. iv. 107.

¹⁰ Ibid. iv. 107.

¹¹ Ibid. iv. 107.

¹² Ibid. iv. 107.

¹³ Ibid. iv. 107.

¹⁴ Ibid. iv. 107.

¹⁵ Ibid. iv. 107.

¹⁶ Ibid. iv. 107.

¹⁷ Ibid. iv. 107.

¹⁸ Ibid. iv. 107.

¹⁹ Ibid. iv. 107.

²⁰ Ibid. iv. 107.

²¹ Ibid. iv. 107.

²² Ibid. iv. 107.

²³ Ibid. iv. 107.

²⁴ Ibid. iv. 107.

²⁵ Ibid. iv. 107.

an occasional tax nominally extending in amount to one-tenth of the goods of those entitled to pay. But the towns were regarded as in the demesne of some lord; and whilst they all contributed their share to the ferm of the shire, the king could only levy the further impost of tallage on such as were in the ancient demesne of the Crown. For the claim to take this tax seems to have rested on the plea that the inhabitants of towns were holders by villan tenure. Thus other lords had in this matter the same rights as the king, and the only restraint on their power seems to have been the understanding that they should not tallage their lands unless the king tallaged the demesne of the Crown. Some foreign expedition seems to have been considered necessary as an excuse for the levy, and the demand of a sum from London was followed by a visit of the itinerant justices to the other towns in ancient demesne which were assessed on the basis of the grant obtained from the metropolis. The name tallage first appears under Henry II, and the tax was continued under his successors. It was perhaps the only tax which John did not exact oppressively; for he desired to win the support of the tenants of the crown lands against the barons. The barons, however, seem to have desired to limit the royal right of tallage, but to have failed in their attempts; for among the articles presented for the king's signature at Runnymede, the one (§ 32) restricting the levy of scutage or aid to the permission of the Commune Consilium, desires a similar restriction in the case of tallages and other exactions from the citizens of London¹; while in the corresponding clause of the Charter (§ 12), as it was actually confirmed, all mention of the tallage disappears². Under Henry III tallages were frequent, but the oppressiveness seems to have been often lessened by exacting them, like the later benevolences, only from the richer citizens. Tallage, however, followed the taxes already mentioned, and gradually fell into disuse. It is sometimes supposed to have been forbidden by the Confirmatio Cartarum of 1297, but the Latin version of that document, which bears the significant title *De tallagio non concedendo*, although it was treated by the judges in the Hampden case under Charles I as a statute, was merely a chronicler's *résumé* of the intention of the French document itself. It even seems doubtful, in view of some of his later

¹ *Sel. Chart.*
p. 293.

² *Ibid.*
p. 298.

answers to remonstrances from Parliament, whether the king considered that the comprehensive statute of 1340 included tallage among its prohibited methods of taxation. However that may be, there are only three known occasions on which after 1297 a tallage was imposed;—by Edward I himself in 1304, when it met with no complaint; in 1322, when it was strenuously but vainly resisted by London and Bristol; and in 1332, when Edward III accepted a grant of a fifteenth-and-tenth from Parliament instead. The fact was that the changed method of taxation consequent on the formation of a Parliament of Estates, removed any claim of the king or of the lords to levy such special contributions from the towns in their demesne. For, after 1283 separate negotiations by officials of the Exchequer with the various taxpaying communities practically ceased in favour of a general grant made in Parliament; and the principle of tallage only afforded an extra plea to those towns which, in their desire to escape representation, vainly tried to urge that they were not in ancient demesne of the Crown. Thus the king's retention of tallage after the summons of representatives of the boroughs to Parliament was an illogical proceeding, if, as seems natural, he desired to levy a tax upon the whole burgher population and not on those in the demesne of the Crown alone.

§ 76. The disappearance of these class taxes of a feudal era brings us to the period of national taxation. Here, before the continuous history of the most important and permanent forms of taxes is detailed from their early stages to the shape in which they have reached us at the present time, it will be convenient to mention two temporary methods of taxation which never passed beyond the stage of experiment. In the last Parliament of the important reign of Edward III (1377) the king's ministers suggested to the Commons, as one among several alternative methods of taxation, the levy of a groat on every hearth. Ultimately both Parliament and Convocation granted a *poll-tax* of a groat a head on all persons over sixteen years of age, and this form of taxation was repeated in 1379 and 1380, with the important difference that in both cases it was graduated. Thus, in 1379 the scale descended from the Duke of Lancaster who paid ten marks, down to the poorest person whose contribution was a groat; while in 1380 the

¹ Dowell,
Hist. of
Taxation,
i. 93-9.
² *Ibid.*
iii. 3-4.

maximum difference between payers was on the much smaller proportion of sixty groats to three¹. It was this latter levy which formed, at any rate, the excuse for the Peasant Revolt of 1381; and consequently, this method of taxation practically² disappears until after the Restoration, when it was revived as one of the means of obtaining the necessary increase in the revenue for purposes of government. It was exacted on three occasions under Charles II, and regularly after the Revolution from 1689 to 1698. In 1706, on the expiration of the grant made in the latter year it was not renewed. It was not a popular tax, although under Richard II it had served the useful purpose of bringing home to every individual in the kingdom the misdeeds of the royal ministers.

Nor was the similar levy of the *hearth money* any more successful. The principle had been long familiar in the payment of Peter's Pence, a tax of a penny on every hearth which from the beginning of the tenth century formed an annual contribution to the Pope, but which at some period before the thirteenth century was compounded for a lump sum of rather more than two hundred pounds. It has been seen that the suggestion for its adaptation to the needs of the country in 1377 did not meet with favour; nor is there mention of it until after the Restoration, when, from 1662 until the Revolution, a levy was made of two shillings on every hearth or stove. The inquisitorial nature of the tax, which would necessarily lead to the domiciliary visits of the collectors, no doubt accounts for its unpopularity and consequent discontinuance after the Revolution of 1688³.

³ *Ibid.* iii.
165-7.

Levied
directly.

The more permanent forms of national taxation may be divided under the two heads of *direct*, i. e. paid immediately by the contributor; and *indirect*, i. e. falling only ultimately on the person who is intended to pay it. Under the first head will be mentioned successively the various attempts made from the fourteenth to the eighteenth centuries to levy a tax on the real and personal property of the country. This required for its efficiency a constant reassessment, a difficulty which was no doubt the reason why the Tenth-and-fifteenth, the Subsidy, and the Property, or rather Land Tax, each in turn became settled at a fixed amount and levied on an old assessment. Thus with the lapse of time they decreased in value, and needed

first supplementing and then abolition in favour of more productive methods. The Property Tax still drags out an unpopular existence under the more appropriate name of the Land Tax; but the real direct tax has for the last century been the Income Tax. First among the indirect taxes stand the Customs with their long, intricate, and interesting history; to them, since the Restoration, has been added the Excise; and since the Revolution, Stamp duties of multifarious kinds, although in both cases these include payments which come under the head of direct as well as indirect taxes.

The germ of national as opposed to feudal forms of taxation must be looked for in the reign of Henry II. The growing wealth of the country and the close contact with the continent induced Henry to attempt to bring under contribution to the state incomes that were derived from other sources than land. Indirectly this attempt was made as early as 1181, when, by the Assize of Arms, all freemen, except the greater tenants-in-chief, were directed to have in their possession arms corresponding to the amount of their income¹. The first instance of a direct contribution on this basis is the Saladin Tithe of 1188, in which a tenth part *reddituum et mobilium*, i. e. of rents from land and of income from merchandise, was levied from every one in support of the Crusade. It was not until all the financial resources of the country were called out for the payment of Richard I's ransom, that the justiciar, Hubert Walter, Archbishop of Canterbury, first applied this method of taxation for national purposes. In 1193, besides the payment of the feudal aid by the tenants-in-chief, one-fourth was demanded from clergy and laity alike, not only of their rents, but also of their 'moveables.' In fact, whatever may have been Henry II's intention in its first devising, this tax, when it emerged as a regular form of levy, consisted of fractional parts, varying from one-fourth to one-fortieth, levied on rents from land and incomes from personal property. As the fairness of an individual return could scarcely be expected in the computation of personal property, the assessment was made by a jury of neighbours. But on the other hand, the undue pressure of a tax so jealously guarded from evasion was mitigated by the allowance of numerous exemptions. The exemptions applied sometimes to goods of a particular class, but latterly and more rationally to

Tax on
Moveables.

¹ *Sel. Chart.*
p. 154,
§§ 1-3.

the possessors of all goods below a certain value. Thus, while from the collection of a thirtieth in 1237 were excepted, not only all goods applied to ecclesiastical uses, horses used for various

¹ *Sel. Chart.*
p. 366.

² *Ibid.*
p. 431;
Ann.
Winton.
p. 120.

purposes, the precious metals and household utensils¹, in 1276 the exemption applied to all persons not having goods of the value of fifteen shillings². The history of the grant of the tax

may be distributed into four periods. For the first century of its levy (1193-1290) it was negotiated separately with each shire by the officials of the Exchequer. After 1290 it became

a grant made by the assembled Parliament; but until 1334 each estate voted its own liabilities and in a different proportion to the rest. For the purpose of money grants, these estates were often four—clergy, who, however, actually voted their share in Convocations, lay barons, knights of the shire, and burgesses. But the knights and burgesses coalesced, and, as being the poorer and more numerous portion of the taxpayers, claimed the right of deciding the amount of a grant. The old distinction between estates gave way to a new distinction based on the difference between town and country or, roughly, between real and personal property; and while the ordinary proportion granted for dwellers outside a chartered town was one-fifteenth, one-tenth was the settled share of inhabitants of a parliamentary borough. A further change followed almost immediately upon the acceptance of these rates; for in consequence of the rigid exaction of the tenth-and-fifteenth in 1332, it was arranged that a further increase should be avoided by taking the contribution of each community for the future at the actual amount for which it had been assessed in that year. Thus the *tenth-and-*

Tenth-and-Fifteenth.

fifteenth became a fixed sum of about £39,000; and Parliament granted it as such, sometimes voting two or more tenths-and-fifteenths, sometimes adding a half tenth-and-fifteenth. It has already been remarked that the connexion of this arrangement with the definite division of Parliament into two Houses can scarcely have been altogether accidental. But not only had the tenth-and-fifteenth become a fixed sum of £39,000; during the fifteenth century it tended to decrease in amount. From the early years of Henry VI onwards, for reasons which it would be too long to mention here, Parliament seems to have found it necessary in voting the supplies to grant remissions of definite sums, and to specify for exemption particular

towns. Thus in 1433, £4,000 was remitted from the tenth and-fifteenth voted, and Great Yarmouth and Lincoln were mentioned for exemption. Sometimes the list included a larger number of towns, of which some were wholly, but others only partially, exempted. The effect of these remissions has been minimized by calling them 'no more than the reduction to a regular system of a practice which had prevailed in an irregular and uncertain fashion before'¹; but it seems scarcely true that 'the amount was not a large one,' and in any case, the reduction of such occasional remissions to a system would permanently decrease the sum total on which calculations of grants were based². The result was that the tenth-and-fifteenth by no means represented the taxable capacity of the country. It had been originally intended that there should be periodical re-assessments of the property subject to the tax; but this design had been frustrated by the practical commutation of the tax and by the exemptions granted to particular communities. The decaying grant must, upon the now antiquated assessment, have fallen most unfairly and capriciously; and it was natural that with the return of prosperity the Tudors should attempt at any rate to find some regular method of supplementing it. This was found in the subsidy which for more than a century ran side by side with the old tenth-and-fifteenth, and gradually superseded it. The last instance of the old form of taxation is in 1624, the last Parliament of James I.

The first instance of the grant of a *Subsidy* is in 1514, when the Commons, to supply the deficit caused by Henry VIII's expedition to France in the previous year, granted a general subsidy of sixpence in the pound. The amount varied from time to time; but the usual rate became 2s. 8d. in the pound on moveables, and 4s. in the pound on land. The subsidy, however, followed the same course as the tenth-and-fifteenth. In order to keep it a fair levy a periodical re-assessment would have been needed. But 'Englishmen have apparently always objected to inquisitorial levies based on attempts to find out what their actual possessions amount to, and greatly prefer to pay a fixed sum³.' Consequently, before the end of the Tudor era a subsidy came to be based upon the payments made at the last levy; and, although it was never

¹ Ashley, *Econ. Hist.* vol. i. pt. ii. p. 51.

²Cf. Dowell, i. 111.

³ Cunningham, *Eng. Ind. and Com.* i. 487.

reduced so completely as the tenth-and-fifteenth, to a definite amount irrespective of the value of the property of which it was supposed to be a proportion, yet a subsidy came to denote a sum of about £80,000, and as such it was voted by Parliament in the same way as tenths-and-fifteenths after 1332. But although in the case of the subsidy there seem to have been no remissions, yet here too the actual amount raised tended to decline. For, such assessment as there was seems to have been carried out in so unfair or at the best so careless a manner that poor and wealthy paid a like amount. Meanwhile the clergy continued to tax themselves apart, although after 1533 their grant had to be confirmed by the Crown in Parliament. During the Commonwealth the subsidy was abandoned in favour of more lucrative modes of raising money, and on its revival at the Restoration the lay and clerical subsidy together did not amount to more than £70,000. Whether this was the reason or not, the subsidy disappeared as a means of taxation, and the clergy by an informal agreement between the Chancellor and Archbishop Sheldon of Canterbury waived their privilege of voting their supplies separately in Convocation.

Monthly
Assess-
ment.

It has been shown that royal revenues had not only proved inadequate under Charles I to meet the growing expenses of government, but that at the Restoration they were deliberately diminished by the surrender of the feudal incidents. Among the methods resorted to for their increase, two—the poll tax and hearth money—were of merely temporary interest. But meanwhile, the Commonwealth, borrowing largely from the Dutch, had introduced expedients which, despite the bitter outcry raised against them by the royalists on the ground of their excessive severity, were at the Restoration adopted by the ministers of Charles II. The chief of these expedients were the excise and the monthly assessments. Of the excise something will be said presently under another head. The *Assessment*¹ was merely the Tudor subsidy levied in the strictest possible manner: for the sum required was settled and demanded month by month, the occupier was responsible for the payment, a proportion was assigned to each district and was taken on an official assessment of the actual value of a man's possessions. The result was no doubt a general

¹ Dowell,
iii. 72.

pressure which fell more severely on all owners of property in the country than the most unconstitutional levies of the Stuart kings. The consequent discontent had no doubt something to do with the reaction which ended in the Restoration: but the best testimony to the ability of the parliamentary methods of finance is found in their adoption by the royalists themselves. From the date of the abandonment of the subsidy the assessment was used in its stead, but a longer trial seemed to show that, however well it might succeed as a temporary method, it was difficult to carry out a continual re-assessment. The assessment became careless; it was complained that personal property, which would of course be the more difficult to estimate, did not pay its fair share of the whole; and thus, although the amount produced was certainly greater than that yielded by the subsidy, it was not so much greater as to encourage the financiers of the Revolution to be content with it as a permanent means.

Indeed, the last levy of the assessment was in 1691; and in the next year came the last attempt 'to lay a fixed and permanent charge upon all property, real and personal.' This Property Tax, as it was intended to be, was a subsidy of 4s. Land Tax. in the pound on land, offices, and personal property. But the assessments still continued so careless that the yield of the tax decreased with each year, until in 1697 the ministers, falling back on the assessment of 1692, calculated that the rate of 1s. in the pound on that assessment would produce nearly £500,000, and thus turned the Property Tax, as the tenth-and-fifteenth and the subsidy before it, into a fixed sum. To make the likeness complete, this sum was apportioned among the towns and counties at a definite amount. This last attempt at the taxation of all property contained every element of injustice. Provision had originally been made for the assessment of personal property and offices in order that their owners should contribute to the fixed amount; but since personal property is continually shifting, while the value and ownership of land can be ascertained at any moment, and since it had been provided that any deficiency should be met by an extra levy on the land, the death of the original payers of quotas on personal property was followed by the levy of the whole sum from the land alone. The intended Property

Tax thus became the *Land Tax*. But even as a land tax it was unfair; for, despite an attempt at the Restoration to adopt the carefully made assessment for the levy of ship-money, the usual basis of assessment was that made under the Commonwealth in which, owing to the devotion of the home counties to the parliamentary cause, the burden of the tax was placed on them. This they continued to bear, despite the fact asserted by an influential writer at the end of the seventeenth century that the northern and western parts of England had grown proportionately wealthier since the Restoration. From 1697 to 1798 the Land Tax fluctuated between 1s. and 4s. in the pound, being calculated to produce half a million of money for every shilling rated. But in 1798 Pitt fixed it at a perpetual rate of 4s. in the pound, thus making it a permanent charge upon the land; and as such it remains to the present day. The rate is levied on the old assessment of 1692; but by a provision of Pitt's Act much of it has been redeemed. At the same time, the charge upon personalty which had fallen into complete disuse, was made a separate tax annually granted; but it produced so little that in 1833 it was repealed. The tax on offices, which was also a part of the original grant of 1692, was not finally abandoned until 1876¹.

¹ Dowell,
iii. 81-91.

Income
Tax.

It must have been evident to financiers by this time that the direct taxation of property, which must depend for its efficiency on perpetual re-assessment, was an insurmountable difficulty. From the time of Pitt, therefore, the attempts at direct taxation take a different form, and he inaugurated the *Income and Property Tax*, so familiar at the present day.

A precedent for such a tax was to be found in the fifteenth century. We may set aside as irregular the cases of 1382, when the 'landowners' taxed themselves on the plea of the poverty of the country², and of 1404, when the lords temporal granted a special tax of five per cent. from all those whose incomes were over 500 marks a year³. But in 1435, and again in 1450, a graduated tax on incomes derived from fixed sources formed part of the ordinary parliamentary grant. In the former year the rates were 6d. from incomes between £5 and £100; 8d. from those between £100 and £400, and 2s. on all those above that amount⁴. In 1450 the taxable

² Dowell,
i. 104.

³ *Ibid.*
i. 106.

⁴ *Ibid.*
i. 113.

unit was lower, being 6*d.* on all between 20*s.* and £200; 1*s.* between £20 and £200, and 2*s.* on all above £200'.¹ Dowell, There seem to be no further instances of this tax until Pitt^{i. 316.} imposed it in 1799. Now, while leaving incomes under £60 entirely free, he made it a graduated tax on those between £60 and £200, and a tax of ten per cent. or 2*s.* in the pound on all incomes above £200. The tax was repealed by Addington after the Peace of Amiens in 1802, but was revived on the renewal of war in the following year at the rate of five per cent. on all incomes of £150 and beyond. The sources of income were now classed under five separate schedules, and the yield of the tax was about six millions a year. It continued and was increased from time to time until 1815, when the close of the war once more removed the excuse for its imposition. But in 1842, when Sir Robert Peel came into office after a series of deficits, some strong financial reforms were necessary. These chiefly took the shape of a gradual reduction of the heavy and multifarious customs duties. In order to help the government to tide over the time until the anticipated increase of trade should give back to the revenue in other ways the amount of customs so surrendered, Peel revived the Income Tax at 7*d.* in the pound for a period of three or perhaps five years, allowing total exemption on all incomes under £150. But the tax was renewed for another period in 1845, and, despite the repeated assertions of its temporary nature by successive Chancellors of the Exchequer, it has never been repealed. Until 1888 the rate varied almost from year to year, rising as high as 1*s.* 4*d.* in 1855-6, and falling as low as 2*d.* in the pound in 1874-5. From time to time slight changes have been made in the amount of incomes subject to abatement or exemption from the tax. Thus from 1863-1871 all incomes under £100 a year were exempt; while from incomes under £200 an abatement of £60 was allowed, and the tax was taken on the remaining £140. In 1872 the abatement was extended to £80 out of incomes under £300; and finally, in 1876 exemption was extended to incomes under £150 and an abatement of £120 to incomes under £400'. At its² *Ibid.* original re-imposition in 1842 the intrinsic unfairness of a tax^{iii. 92-112.} which treated precarious and certain incomes alike was widely

felt; but in view of the necessity of doing something quickly to restore the revenue to a healthy state, and on the understanding that the tax was only to be a temporary expedient, the objections were not pressed. It has now become practically permanent, but not till the present year (1894) has anything been done towards the realization of a scheme advocated by many politicians and economists, of a graduated income tax.

Levied indirectly.
Early History of the Customs Duties.

¹ Dowell.
i. 75.

² Hubert Hall,
Customs Revenue of Eng. i. 58-62.

§ 77. The history of indirect taxation opens with the intricate and often obscure *Customs* duties. A twofold origin has been assigned to this important portion of the revenue. On the one hand, the Customs are generally regarded as the toll which the king, as representative of the nation in its intercourse with foreign countries, exacted from merchants in return for his protection, and as a licence to carry on their trade unmolested¹. A slightly different view has made the Customs the counterpart to Purveyance, springing from the prerogative right of prise or arbitrary seizure of supplies with the double object of relieving the royal wants, and watching over the native commerce². Nothing, however, turns on the origin of these dues. In either case their history is that of the commutation of these tolls or prises in kind, arbitrary probably in both cases, for money payments or for definitely limited amounts of the article on which they were levied. And it is to be noted at the outset that, unlike our present system, duties were levied on goods exported as well as on foreign goods brought into the country. Thus by the opening of the thirteenth century custom or agreement between the king's officers and the merchants had fixed these commutations. On the export of wool and leather, the staple commodities of the realm, a toll was taken of half a mark (6s. 8d.) on each sack or on 300 woolfells (i. e. fleeces or untanned hides), and a mark on a last or load of tanned hides or leather. On the import of wine the duties levied on native and on foreign merchants differed. From the former was taken the *Recta Prisa* which, comprising the forfeiture of one or two casks from each cargo according to its size, practically amounted to a payment of one-tenth. But the alien merchant had to pay in money, and a toll was taken from him on each cask of the cargo at no settled rate. All other articles, beyond wool, leather and wine, whether of import or export, still remained subject

to the royal right of prisage, and were arbitrarily seized by the king's officers until they were redeemed by the traders, often at a ruinous cost. Sometimes it seems that even a licence over and above the settled toll was paid by an individual trader for leave to export or import a particular cargo. But all rates above the ordinary rates were known as *mala tolta*; though, with the curious tendency of all mediaeval financial transactions to stereotype themselves, even this illegal impost was generally taken in the shape of an advance of the ordinary rate to 40s. or three marks on the sack of wool. The attempts of the nation to check the arbitrary power of the Crown in the matter of the customs began with Magna Carta, when the *Antiquae et rectae consuetudines* in all their vagueness were allowed, and all *mala tolta* were forbidden¹. This does not, however, seem to have had much influence in the direction of restraint; and in the first Parliament of Edward I, held on his return from Palestine in 1275, the *Magna aut antiqua custuma* was settled at the rates mentioned above, and granted to the king as part of his ordinary revenue. Henceforth any maltolt became unconstitutional. A further step was taken in the attempt of the Confirmatio Cartarum in 1297 to check the royal right of arbitrary prisage by a clause which forbade, without consent of the realm, the levy of any aids, mises or prises except those already settled². Henceforth it was not possible for the king, without flying in the face of Parliament, to place arbitrary dues upon English merchants. But nothing had been done to interfere with the exercise of the royal prerogative in its dealings with foreigners. To this the king now turned; and in 1303, by the *Carta Mercatoria* conveying certain privileges to foreign merchants, Edward I obtained their assent to the *Parva et nova custuma*. These included an increase of fifty per cent. on the customs on wool and leather; so that an alien henceforth paid 10s., where a denizen or native merchant paid 6s. 8d. To this was added a settled duty of 2s. per tun on imported wine, which went by the name of *butlerage* or *tunnage*, and 3d. per pound of 20s. on all other imported and exported merchandise. This was the origin of *tunnage* and *poundage*. In 1309, probably in answer to popular demands, the latter were suspended; for it was thought that with the right

¹ *Sel. Chart.*
p. 301, § 40.

² *Ibid.*
p. 495, § 6.

of the king to extra dues would disappear the privileges of the *Carta Mercatoria* by the grant of which they had been gained. Nor was this all: for in 1311 the Ordinances entirely abolished the *nova custuma*. On the revival, however, of Edward II's authority in 1322 they were immediately revived. But meanwhile the native merchants had refused to assent to the levy of the higher rates, and consequently remained subject to the *antiqua custuma* as far as it was settled, together with the exercise of the royal right of *prisage* so far as the Crown could still exact it in accordance with its old prerogative.

Parliamentary
control of
Customs.

¹ p. 153
above.

But the events of the reign of Edward III forced Parliament to great efforts in the direction of curtailing the royal prerogative in the matter of taxation. The control of the customs was as important as, and far more difficult than, the attempt to keep a hold on the direct methods of taxation. But the underhand dealings of the king with the merchants¹ made it imperatively necessary that something should be done. The Commons were shrewd enough to see that although the king cared not to guard the theory of his prerogative power so long as he possessed the substance of kingly authority, yet the unsupported authority was only such as each individual king could make it, and when the theory had been yielded, Parliament had but to bide its time to make good the substance of power. Indeed, Edward III himself provoked them to the attitude which they adopted, by his attempt to gain their sanction, and consequently their money, for his foreign enterprises. Parliament was careful, therefore, without combating the king directly, to sanction after they had been taken, the loans which he had raised by agreement with the merchants; and thus to maintain the position, which on any opportunity they definitely asserted, that all taxation should be authorized by them. Thus it was not until half a century after the king, in virtue of his prerogative, had first levied the *nova custuma* from alien merchants that Parliament, in the Statute of Staples² (1353), gave its sanction to the levy. And the Act passed without protest from the king. But the popular leaders went further, and in some important matters forestalled the probable action of Edward III. Thus, when the foreign wars of Edward began, it was not improbable that he would have imitated his grandfather by the levy of a maltolt. To prevent the possi-

² 27 Edw.
III, st. 2.

bility of such a course Parliament made him a definite grant at the old rate of the maltolt in the form of a *subsidy on wool and leather*. The first instance of this grant was in 1341 at the rate of 40s. alike on the sack of wool, 300 wool-fells or a last of leather; and from the time of the Statute of Staples this became one of the most regular means of supply, Parliament forcing the king to allow by statute in 1362, and again in 1371, that no subsidy should be placed upon wool without its consent. It was, indeed, an extra tax on wool over and above the rates of the magna custuma already granted as part of the hereditary revenues of the Crown. But not content with this, Parliament proceeded in 1373 to transform the nova custuma into a *subsidy of tunnage and poundage* at the rate of 2s. per tun on wine, and 6d. per lb. on merchandise not already bearing fixed custom. By this means English as well as foreign merchants were brought within the payments of tunnage and poundage, which hitherto had been imposed on foreigners alone. Thus the subsidies were specific grants, in contrast to the customs which were the regulation and limitation by Parliament of the ordinary exercise of the royal prerogative. The remaining history of both branches is soon told. The ancient customs on wool, together with the subsidy on wool, decreased in amount as England took to manufacturing her own raw material into cloth. Thus whereas these customs had under Edward III reached the imposing sum of £68,000; under Henry VI, in 1448, they had shrunk to £12,000. The customs, therefore, lingered on while the subsidy died out; for cloth rather than wool became a chief article of export. Tunnage and poundage were granted to the Crown for short periods, but continuously until 1418, when they became a grant to the king for his lifetime, made on his accession, and so remained until the first year of Charles I. Meanwhile, the old wine duties on denizens known as prisage, and on aliens known as butlerage remained in the hands of the Crown, and were usually granted out to subjects. They were even exempted from the consolidation of the customs duties which took place at the Restoration; and it was not till 1803 that they were turned into annuities to be paid to the persons to whom the Crown had granted the original duties. The whole position of the customs duties

at the end of Edward III's reign will best be gathered from a short summary of the difference in the payments exacted from native and from foreign merchants respectively. Thus, on *wool and leather*, while they might both have to contribute to an extra subsidy of 40s., ordinarily the native paid the *antiqua custuma* of 6s. 8d. as against the *nova custuma* of 10s. on the part of the foreigner. On *wine*, while they were both equally liable to the more regular tunnage subsidy, the *recta pris*a of the native was probably more than balanced by the butlerage to which the alien was subjected. Finally, on *merchandise* the Englishman was the victim of the poundage subsidy alone; the foreigner was bound by the extra levy of the *nova custuma*, which added to his duty 3d. per pound on general merchandise.

Position of
foreign
merchants
in England.

The case of the foreign merchants was at the beginning very hard. Certainly they were encouraged by the king and the nobility, who, as the chief landowners, were interested in encouraging the export of English wool. But they were regarded with great suspicion by the people, whose jealousy caused the position of the aliens to be surrounded with restrictions. Thus the foreigners not only paid higher rates of customs than the native merchants, a fact which gained them additional encouragement from the king, but they paid in money and not in a percentage of their goods. Moreover, the desire was growing up in each country for the possession of an abundant treasure. Consequently, they might not, in payment for the goods imported, take money but only English goods out of the land. The home merchants were further protected by a denial to aliens of the power of engaging in the retail trade. Finally, for police purposes, foreigners were restricted as to the time and place of residence, for they must lodge with citizens who would be responsible for their good behaviour, and must depart as soon as their goods were sold; and they were subject to reprisals for the bad debts of their fellow-countrymen. It was impossible for foreign trade to flourish under such conditions. Merchants trading with England formed themselves into two societies for mutual protection. Of these the earliest was the *London Hanse* consisting of seventeen towns mostly from Flanders and North-Western France, which had the double object of freedom of trade with England

and the monopoly of the English trade abroad. But although this organization lingered on until the fifteenth century, it was completely overshadowed by the more important body of the *Teutonic Hanse*, which, starting under the auspices of Cologne for purposes of trade, and with its centre on the Rhine, was by the end of the thirteenth century swallowed up in the larger political organization led by Lübeck and clustering round the Baltic. Headed by this powerful body and favourably regarded by the king, the merchants obtained a gradual relaxation of their disadvantages. Thus, by the *Carta Mercatoria* of 1303 in return for the extra payments of the *nova custuma*, many of these disadvantages were withdrawn. They were allowed to engage in retail trade in certain specified goods, a restriction which was entirely removed in the course of Edward III's reign. Again, the restriction as to their place of abode was removed; and under Edward III they were allowed to prolong their stay for forty days or even more, provided they took their share in ordinary taxation. Indeed, Edward III's whole policy was aimed at the encouragement of foreign trade; and while he granted letters of safe conduct to alien merchants who were deterred by the liability to reprisals, his successor withdrew the restriction as to the exportation of money to the extent of half the value of the goods imported. But the oligarchical feeling which the English burgesses shared with their foreign brethren proved too strong for the desires of the king, and after a short spell of absolute freedom (1351-1377), followed by a similar period of indecision on the part of the executive, the towns procured the Statute of 1393 (16 Ric. II, c. 1) which withdrew from foreign merchants the licence to take part in retail trade¹.

But the action of the English merchants was not merely negative. They sought not only to repel the invasion of the foreigners, but to carry the mercantile contest into the enemies' country. For this purpose they gradually organized themselves. The regulation of trade at the English ports began with Edward I, who not only accepted the fixed customs as a parliamentary grant, but for their better collection substituted for the sheriffs and the various officials hitherto employed, regular customers, and moreover appointed certain

¹ Cf. Ashley, *Econ. Hist.* vol. i. Pt. pp. 104-8. Pt. ii. pp. 13-17.

ports in England to which the goods for exportation should be carried for shipment abroad. Under Edward II the merchants themselves, who may have already been a separate body, were recognized by charter in 1313 as a trading association of *Merchants of the Staple*. The staple itself, or place to which the wool should first be taken, was in the same reign fixed abroad, at Antwerp. But the system of a staple was at first much opposed by the English merchants, for whose convenience it was continually moved about chiefly between Bruges and Antwerp. For a time (1328-1341) it was even abolished; but the advantage of a fixed place for the levy of customs for the king and even for the enjoyment of privileges by the associated merchants, was so obvious that the staple was again established abroad successively at Bruges and Calais. But Edward III desired to encourage foreign merchants to resort to England in order that their competition might enhance the price of English goods and the enhanced price might thus draw more money into the country. With this object he not only considerably relaxed the disabilities of the aliens, but by the *Statute of Staples* in 1353 he removed the staple to several English towns, a policy which his successor followed up in 1390, by forbidding English merchants to take any part in the trade in wool. But Edward himself in 1363 found it necessary to retransfer the staple to the other side of the channel, and it was generally fixed at Calais, which had the double advantage of being an English town abroad. On the loss of Calais in 1556 it was with considerably relaxed rules placed at Bruges, whose waning glory it helped to support against the overshadowing development of Antwerp. But the staple was an inelastic organization; it did not lend itself to the expansion of trade to new places. As early as 1407 Henry IV gathered together all English merchants who were trading to foreign countries and were outside the bounds of the staple, into the Company of Merchant Adventurers. In the course of the next two centuries this new organization had outstripped both its foreign rival, the Teutonic Hanse, and its English rival, the Merchants of the Staple. Indeed, it was itself the first of those *Regulated Companies* which with the great outburst of English trade under Elizabeth identified themselves with some definite part

of the world. They took one of two forms, trading either as a Regulated Company proper, such as the Russian and Levant Companies, into which any English subject could gain admittance on definite terms, and the members of which traded each with his own capital though in accordance with the regulations of the company; or they formed Joint Stock Companies such as the East India Company and in a different sphere the Bank of England, trading with a common capital distributed into shares and partaking therefore of the nature of a monopoly.

§ 78. The history of the customs duties from their settlement under Edward III to their resettlement at the Restoration, may be described as political rather than constitutional. From the accession of Richard II to the time of the Tudors there is no instance of an unparliamentary tax upon merchandise. But the grant of tunnage and poundage now made to the Crown for life, laid no direct prohibition on the exercise of the royal prerogative in the matter of the customs; and the trivial use made of this loophole by the Tudor sovereigns was only too faithfully copied by James I. Thus began that long struggle over the parliamentary right of taxation which has already been described under the head of Parliament. It does not appear that the actual amount of increase in the customs duties under the first two Stuarts bore hardly on the merchants. At the same time, English commerce was particularly prosperous; and when the Parliamentary party by the adhesion of the navy obtained command of the coasts and ports, the enhanced customs dues which they exacted, added very materially to their revenues. Thus, whereas in 1610 the customs had amounted to £136,000, and at the outbreak of the civil war in 1642 to about £270,000; in 1650 they stood at £350,000, and on the eve of the Restoration in 1659 at no less than £600,000. Not only the irregularities of the last half century, but also the changed character of English trade in the last three centuries, must alike have suggested at the Restoration the propriety of resettling the customs duties. Accordingly, the old distinctions were abolished and the future liabilities grouped under the heads of (a) Tonnage on French wines at £4 10s.; (b) Poundage on both imports and exports at an *ad valorem* duty of five per cent.; and

Later history of the Customs Duties.

(c) duties reckoned by the weight on woollen cloth, both the 'old rapery' or broadcloth, and the newer kinds such as serges and crapes which had been introduced under Elizabeth by the Flemish refugees. The articles upon which poundage was taken by the Act of 1660 were known as the Old Subsidy. Subsequent percentages of equal amount were laid on practically the same articles in 1698, again just after the outbreak of the Spanish Succession War in 1702 and 1703, just after the Austrian Succession War in 1749, and finally during the Seven Years War in 1759, five percentages in all, the last four being known by way of contrast with the first as the New Subsidy, and being laid almost entirely on imported articles. But the whole twenty-five per cent. was not chargeable even on all the articles enumerated in the Book of Rates which had been provided by the Act of 1660. Meanwhile, the export duty on cloth had been repealed in 1700, and Walpole abolished nearly all the remaining export duties on British manufactures. At the same time, a great number of other duties besides the five subsidies were from time to time imposed on articles which had not needed notice in 1660. Some of these were appreciably reduced and even altogether abolished by Walpole. The fact that they were mainly duties on raw material for English manufactures had the additional advantage of proving an effectual check to the smugglers. Walpole even attempted to alter the mode of collection by developing the system of warehousing, which, while encouraging trade to come to England, only charged a substantial duty on the goods which were consumed in the country. This method had been applied to foreign silks in 1700: Walpole extended it to tea, and would have carried it further but for the furious party opposition which identified it with a general scheme of excise (1733).

Mercantile
System.

But Walpole's measures, excellent as they were, were only a temporary lightening of the load which continued to be placed upon English trade in exemplification of the mercantile system of commerce. According to the principles of this system, power rather than plenty through mutual benefit was the aim of trade with foreign nations. This power was to be obtained by self-sufficiency at home secured through prohibitive duties upon foreign imports, combined with the

acquisition of foreign markets for home manufactures. Thus not only were export duties gradually withdrawn; but the export of English goods was artificially encouraged by drawbacks, bounties, commercial treaties and a monopolization of the colonial trade. *Drawbacks* were customs or excise that were repaid on the exportation or re-exportation of the articles on which they were levied. The warehousing scheme of Walpole was intended to do away with the necessity for such payments; but no general system of bonding or warehousing came into practice until 1803. *Bounties* were extra payments made by the government for the encouragement of production in certain kinds of goods, and especially for their exportation to foreign countries. The chief of these was a bounty of 5s. per quarter upon wheat so long as the home price did not rise above a certain limit. This lasted from the Revolution of 1688 to 1814; but so high did the price of wheat rise during the Napoleonic wars that by that time not only was the bounty on exportation so useless as to necessitate its withdrawal, but an attempt was made to attract sufficient foreign corn to this country by the payment of bounties upon importation. Other well-known instances of bounties were those on whale ships at £1 per ton for the encouragement of the whale fishery, which ceased in 1824; and on linen and cured herrings which continued till 1830. The object of *commercial treaties* was to secure a 'sole market' or the monopoly by the two contracting countries of each others' trade. The best-known instance is that of the Methuen Treaty with Portugal in 1703 by which Portuguese wines were to be admitted into England at two-thirds of the custom imposed on wines from France, while English wool was to be admitted duty free into the markets of Portugal. Finally, the *colonies* were regarded as mere feeders of the mother country, whose business was to grow raw material for the home manufacturers and to afford a market for the surplus goods of English manufacture. As a matter of fact, English statesmen were more generous to the colonies than their French and Spanish rivals; and Walpole allowed both rice from Carolina and Georgia, and sugar from the West Indies to find their way direct to Europe provided they were carried in British ships, while his so-called excise scheme

was largely in the interests of the colonial trade with countries outside the British Isles.

Establish-
ment of
Free
Trade.

The great change from this commercial policy to the present principle of free trade, in which such customs duties as remain are maintained almost solely for the purposes of revenue, was due, among many others, first and foremost to Adam Smith and later to Cobden, whose principles were carried out chiefly by William Pitt, Sir Robert Peel, and Mr. Gladstone. When Pitt came into office (1783) he found the customs duties in a state of great confusion owing to the casual and intermittent manner in which they had been created or increased. Not only were there no less than sixty-eight branches of those duties, but each imported article paid several separate customs, some few of them under as many as fourteen different heads. The complexity was increased by the prevailing system of appropriating each duty to a particular item of expenditure. In the true principles of the 'Wealth of Nations' Pitt reduced many of the existing duties, e.g. that on tea from 119 to 12½ per cent., and so removed much of the temptation to smuggling, from which the annual loss to the revenue was estimated at two millions. With the same object and without any popular demur, he carried out Walpole's scheme of 1733, by transferring the duties on wine from customs to excise. But perhaps most important of all, he simplified the various heads under which customs had been enumerated, laid a single duty upon each article, and arranged for the accumulation of all the proceeds of the customs into one sum, known henceforth as the *Consolidated Fund* (1787). The great war necessitated an enormous increase of taxation; and customs duties were imposed on every available article of importation. But the policy of Walpole in freeing the raw material imported for our manufactures, and the success of Pitt in the direction of simplifying the customs duties, gradually found imitators after the strain of the war was over. Walpole's mantle fell upon Robinson, afterwards Lord Goderich, and on Huskisson, by whose influence, as Chancellor of the Exchequer and President of the Board of Trade respectively, the duties on raw silk and wool and on several metals were in 1824 and 1825 considerably reduced. But it was Sir Robert Peel who worked a thorough reform in the customs duties. He entered on office after

a series of deficits in the annual revenue; and yet, while reviving the Income Tax to tide over the immediate loss to the revenue, he so far showed himself a consistent disciple of Adam Smith and Ricardo, that of the 1,200 articles bearing customs duties in 1842 he removed about 750 from the tariff, and in 1845 he followed with over 400 more. Finally, in 1846, he abolished the duty upon corn. The few remaining export duties entirely disappeared. The final blow to the old protective system of duties was dealt by Mr. Gladstone in his budgets of 1853 and of 1860, with the result that at present no more than sixteen articles find a place in the tariff. The immediate losses to the revenue involved in each of these reductions have been amply atoned by the increased trade of the country and the consequent yield of other taxes largely in the shape of Excise and Stamps.

§ 79. The most permanent methods by which the revenue Excise. was increased after the Restoration were the Excise and Stamp duties. An *Excise* was originally a duty on articles of consumption produced in England. The subsidy on wool of the days of Edward III and his immediate successors has been classed under this head: while Strafford had already suggested the imitation of Holland by a scheme of excise as an expedient for raising money. There seems to have been a deep-rooted aversion in the English mind to taxes on internal trade. But at the outbreak of the Civil War the parliamentary party, in their need of supplies and under the leadership of Pym, braved the anger of the people, and introduced in succession, though only 'at the point of the sword,' an excise in 1643 on ale, beer, cider, and other beverages, and in 1644 on salt, starch, textile goods, and victuals of all kinds. Some of the more common articles of consumption were removed from the list in 1649: but the excessive profitableness of the tax induced the statesmen of the Restoration to permanently incorporate it in the financial system of the country. It was necessary to find some compensation for the feudal dues which the Crown surrendered. The country had become somewhat reconciled to the excise, which had proved a very profitable mode of raising money. Accordingly, in the place of the abandoned feudal dues and the right of purveyance, was made a grant estimated at £100,000 as the proceeds of an excise on beer and liquors,

both home-made and imported. This was added to the hereditary revenues of the Crown; while for Charles II's life a temporary excise was given at the same rate. The hereditary excise formed part of the Civil List of the Crown, which at first was composed of the proceeds of certain revenues and taxes calculated to reach an adequate amount. But in 1736 part of the hereditary excise was commuted by Parliament for an annual sum of £70,000; and in 1787 the rest was absorbed, together with all existing excise duties, into the general scheme of the Consolidated Fund.

Throughout the eighteenth century and the early years of the nineteenth the continually increasing expenses entailed by what has been called the Second Hundred Years War with France, were met, among other ways, by constant *new applications* of the excise. Thus, in 1695 began the tax upon malt, in 1711 upon soap and paper, in 1746 upon glass; while such articles of common and necessary use as bricks, candles, calico prints, leather, and salt, were from time to time added to the list of excisable commodities. The number of these at the end of the eighteenth century has been enumerated at twenty-seven: but the enlightened policy of Robinson and Huskisson reduced them to nearly half that number, and at present they may be counted on the fingers of one hand. Moreover, when the number of excisable articles seemed to have reached its limit, financiers, nothing daunted, proceeded to raise the rate. Thus the charge upon spirits, the earliest of all excisable articles, was only a few pence at its first imposition in 1660, stood at over 3s. just before the outbreak of the French Revolutionary wars, and under the stress of those wars rose in 1819 to no less than 12s. 7d. per gallon.

Extended
to tax on
imports,

Meanwhile, the term excise had been *extended beyond its original meaning* of a tax upon articles of home production and consumption. Even under the Commonwealth it was imposed on certain imported articles, which thus paid a duty at the ports as well as an excise in the process of exchanging hands. But the full effect of the misnomer, for such it really was, appeared in the extraordinary agitation produced by Walpole's Excise Bill in 1733. This was simply a scheme whereby, for the prevention of smuggling and the encouragement of foreign trade, the system of warehousing, already introduced in the case

of foreign silks, should be applied to wine and tobacco, and, as in the case of tea, coffee and cocoa, the customs duty on their importation should be turned into an excise duty on their consumption. For this purpose the articles so to be dealt with were brought to English ports, warehoused, and only such of them were rendered dutiable as were taken out for consumption in England; while those re-exported were free from all except a nominal payment. But despite the continuance of the excise after the Commonwealth, the system was anything but popular in England. The feeling about it may be measured by Blackstone's remark that 'from its first original to the present time its very name has been odious to the people of England,' and by the celebrated definition inserted by Dr. Johnson in his dictionary that an excise was 'a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid.' Thus Walpole's proposal was solely concerned with a change in the method of collection; for the full duty was to be levied by officers of excise. But 'an unscrupulous opposition working upon the general hatred of the name,' turned that name into a description of the character of the tax, and represented it as the first step towards a general scheme of excise necessitating that inquisitorial method of house to house visitation by government officials against which Englishmen have always protested. But the partisan character of the opposition was seen in the ease with which Pitt in 1787 carried out the very measure which Walpole, despite his parliamentary majority, had felt himself constrained to abandon.

An almost equally illegitimate extension of the term 'excise' is that which makes it include *licences* of various kinds. to licences. These are of two kinds, embracing *authorizations* to carry on certain professions or to trade in certain commodities; and *payments* falling almost entirely on the wealthier classes 'for enjoyment of certain things of convenience or luxury.' Of the first kind the earliest instance may be found in the monopolies of Tudor and Stuart times, and more particularly in the licences on inns and alehouses of the same period, which were the cause of such violent abuses. But the real idea of these levies was no doubt borrowed from the Dutch, and first applied

after the Restoration. Under this head, then, would come such payments as the tax upon publicans, upon auctioneers, hawkers, pawnbrokers, foreign wine dealers, tobacconists, and others; while in the latter list would be included taxes on carriages, horses, men- and (until 1792) women-servants, plate, cards, dice, armorial bearings, dogs. In 1785 these were all grouped together under the head of assessed taxes, and up to 1869 the taxpayer was required to pay for those the liability to which he had incurred in the previous year. But at that date the name of 'assessed taxes' was abolished, and a distinction drawn between excise licences and establishment licences; both of which were now required to be taken out at the moment when the liability was incurred, whether it was at the beginning of the year or at any period in its course.

Stamp
Duties.

Alongside of the Excise grew the *Stamp duties*. Indeed, the difference between the two is only one of the manner in which the money is conveyed to the Exchequer. We may set aside as practically already dealt with, such exactions as the admission stamp necessary for practising the calling of a barrister or physician; for it is immaterial whether such tax takes the form of a stamp or, as in the case of a publican, it is paid as a licence. Apart from this these duties fall into two classes, according as they apply, on the one side, to the validity of legal transactions and, on the other, to the devolution of property. Some temporary stamp duties were imposed in 1671; but the first general Act dates from 1694, when stamps varying in value from £2 to one penny were required to such documents, among others, as admission to offices or degrees, marriage certificates, copies and probates of wills. Numerous other documents were from time to time included within the operation of the Act, such as bills of exchange in 1782, and receipts for payments in 1784. At first the amount of the stamp varied in all cases with the length of the documents. But in 1714, in the case of grants to offices, the value of the transaction was taken as the determining point. This was applied in 1784 to receipts which were included within the liabilities of the Act; and subsequently to other legal transactions: while in 1853 the stamp upon receipts was made an uniform sum of 1*d.* for all sums over £2. The most profitable and, in the opinion of some, a most unjust, form of stamp

duty is the legacy and succession duty which was first imposed by Lord North in 1780; but its careless provisions led to so much evasion that Pitt's measure of 1796 was on entirely new lines. It was not the legatees but the executors who were responsible for the payment¹. Pitt had intended to include successions to property of every kind; but he was only able to accomplish a measure which provided for the succession to personal property. It was not till 1853 that real property was brought in a less degree under liability to the same duties; and Mr. Lowe's attempt in 1871 to assimilate the duties payable on both kinds of property was in the end abandoned.

Such were the chief items of national revenue at various times in the history of the country. They may be shortly summarized as follows. The Anglo-Saxon kings were practically dependent on the revenue which came to the Crown from the king's private property, the royal demesne, the profits of justice, and the exercise and enjoyment of various prerogative rights. Not till after the Conquest were these in any way calculable at a money value. Under the Norman kings the feudal dues were added to the revenue; but it was only in Henry II's reign that taxation began to assume important proportions in the national income. The taxes of a feudal nature, scutage, tallage, and the hidage or carucage, which had taken the place of the earlier danegeld, dragged out their existence until the reign of Edward I, after which they practically disappeared. Besides the royal demesne, which fluctuated almost from year to year according to the checks put upon the lavish generosity of the king, and many pecuniary rights which came from the prerogative, the chief items of income were (1) the tax on moveables begun under Henry II, and under Edward III not only assuming the shape of a levy in the definite proportions of a tenth and a fifteenth, but even becoming a fixed sum of nearly £40,000; (2) the customs, whether as at first in the shape of the ancient customs and subsidy on wool, or the tunnage and poundage of a later period. The only change up to the Civil Wars was the attempted remedy of the deficiency of the tenth and fifteenth by the subsidy of the Tudor times. Of the old rights of the prerogative some continued in full force throughout the period, while others were only revived from time to time as methods of raising money by unscrupulous

¹ Dowell,
iii. 133-4.

Summary.

kings. But the experiments of the Commonwealth, borrowed largely from Holland and adopted by the statesmen of the Restoration, began the modern system of taxation. The feudal dues and some of the most vexatious of the old royal rights were entirely abandoned. Even the subsidy gave way to what was intended to be a property tax, but became merely a land tax. The customs were placed on a new basis, and two practically new expedients, the excise and stamp duties, soon proved to be among the most lucrative items of the national revenue. Finally, from the time of the younger Pitt the customs and excise have been gradually decreased, and the deficiencies made good by the Income Tax and Inhabited House duty.

Loans.

§ 80. But since the Revolution of 1688 the whole method of governmental finance has been changed by the increased facilities for borrowing money, which entirely did away with the necessity of making expenditure tally with the revenue of the year. Even before the Revolution a very partial view of the financial resources of the administrative would result from the omission of all mention of the numerous loans contracted from time to time by the government.

The Jews
in England.

The earliest creditors of the king were the *Jews*. There are isolated notices of their presence in England even before the Norman Conquest; but their importance in the financial history of the country dates from their more numerous settlement in the Conqueror's reign. From that time until their banishment by Edward I they were the king's financial agents. One of the so-called Laws of Edward the Confessor describes them as the king's chattels. Indeed, they were absolutely without status in the kingdom, nor was there any foreign government to interfere in their behalf. The king, on the one side, fleeced them most unmercifully. Thus, under Henry II the Commune Concilium, which had agreed upon £70,000 as the sum likely to be yielded by the Saladin Tithe for the Crusade, proceeded to assess the Jewish population for the same purpose at no less than £60,000. The story of John's treatment of the Jew of Bristol who was condemned to lose a tooth a day at the cost of 10,000 marks until either his teeth or his treasure were exhausted, and who held out for six days against the king's demand, is perhaps scarcely

an exaggerated illustration of the attitude of the king in the matter. In self-protection the Jews gathered together not only into those towns where public chests were maintained for the registration and preservation of their bonds, but even into special quarters of the towns where they could practise, unmolested by any city official, their language and their religion. At the same time, every effort was made for their conversion. Converts as being Christians ceased to be chattels of the king; and in 1233, in what is now known as Chancery Lane, a *Domus Conversorum* or state-endowed home for Jewish Christians was set up, an example subsequently followed both at Lincoln and Oxford. At the same time, Richard I had given them a regular organization. The revenue obtained from the Jews, which came both from extortion and in payment of licences for various purposes, was gathered into a special Exchequer of the Jews presided over by special justices, sometimes themselves of the Jewish persuasion, who also exercised a civil jurisdiction, to the exclusion of other courts, in cases where a Jew was concerned. John and Henry III granted them further privileges and protection. But the utmost royal favour could not shield them from the popular hatred. The Scriptures prohibited the taking of interest for loans; and in the absence of any field for investment of spare capital, a demand for recompense was regarded as an attempt to take advantage of a neighbour's necessities. Consequently, the exaction of interest was forbidden to Christians under the hateful name of usury. But the Jews were not amenable to Christian law; and the dangers which they incurred aided no doubt quite as much as their proverbial greed, to enhance the rate which they demanded. Thus we are told of certain Oxford scholars who considered it a good bargain that they should pay only twopence weekly on a debt of twenty shillings; while at another time the scholars were so literally in the hands of the Jews, who had been among the first to set up hostels in Oxford, that they had pawned most of their books to pay the necessary interest on loans, and were unable to continue their studies until the king intervened in their behalf. But more generally it was apparent that out of their loans to extravagant and heavily taxed landowners the Jews made large profits such as were

impossible to the thrifty merchant; while the fact that it was the Crusades which gave them special opportunities for piling up riches out of the necessities of enthusiastic Christians, added still further fuel to the fire of popular hatred which burst out ever and anon. It was, however, only by such means that they could keep pace with the royal demands, and thus the king's use of them, which did not diminish their unpopularity, imposed a large indirect taxation upon the industries of the country. It was scarcely likely that their services to learning, as students of physical science and medicine, as teachers of mathematics and Hebrew, and as collectors of valuable libraries, should have received due recognition. From the time of Stephen onwards no story against them was too impossible to be believed; nor are the kings free from the charge of fostering such tales for the purpose of making the Jews pay heavily for protection. At length Edward I, much to his own disadvantage, yielded to the popular clamours, and in 1290 wound up a series of harsh measures by a sentence of banishment which, despite his best endeavours, was most cruelly carried out. There is abundant evidence after the decree of banishment of the continuance of Jews in England, chiefly in the guise of physicians or foreign merchants; although as a body they were not allowed to return until the Commonwealth. The accusation on which they had fallen had been that of tampering with the coinage; but, whether this were true or false, the real reason is rather to be found in the accumulated hatred of all classes of the people and the formidable rivalry of merchants from Italy, who were successfully assuming the position of bankers in many European countries.

Foreign
merchants.

The success of the Jews had been largely due to the connexion, through their co-religionists, with most of the civilized countries of the world. Thus while, on the one side, they were money lenders, on the other they were foreign money changers. In the latter rôle they were rivalled and forcibly superseded first by *Coursines*, merchants from Cahors, and more effectually by *Italians from Lombardy and Florence*, who had spread themselves all over Europe in a twofold capacity. From every part of Western Europe large sums of money were annually transmitted as tribute to the Pope. These

merchants were employed as papal agents to collect and transmit what was due. Nor was this all: for the produce of the East found its way to European markets through the ports of Italy. For its distribution Italian houses of business formed a network of connexions throughout Europe. It has been pointed out that nearly all the early commerce of the country was in the hands of foreign merchants. Indeed, the English tributes to the Pope were largely paid in wool. Thus the conduct of the foreign trade both in England and elsewhere made the merchants also into money changers. Moreover, their business could not be carried on without considerable capital, and as possessors of large sums of ready money they became creditors of the king; while the facilities necessary for the prosecution of a valuable trade caused them to become banks of deposit for the money or goods of wealthy individuals. These foreign merchants were regarded by the English people with scarcely less suspicion than was bestowed upon the Jews. The kings, however, especially after the expulsion of the Jews, welcomed them and gradually withdrew the disabilities to which they were subjected. Yet even with this encouragement their trade gradually died away. Edward III not only borrowed largely from them, but even repudiated his debts; and the consequent ruin of the great house of the Bardi is said to have plunged half Florence into distress. The merchants not unnaturally became shy of lending to the king, who was forced to resort elsewhere. But even their trade gradually declined. The increased manufacture of English cloth after the reign of Edward III, and the consequent decrease, amounting almost to a cessation, in the exportation of English wool, deprived them of their chief article of trade; while the obstacles put in the way of their exportation of coin rendered it hard for them efficiently to conduct the exchanges. Their chief work came to be merely the negotiation of bills of exchange. At the same time, the English towns prevailed alike over 'the weakness of the Lancastrians and the bourgeois sympathies of the Yorkists'; obstacles were once more placed in the way of foreigners, and, at the same time, the English merchants had begun to organize themselves in associations and companies of which mention has already been made.

Meanwhile, the change of opinion on the subject of usury

¹ Ashley,
Econ. Hist.
vol. i. pt. ii.
p. 15.

Regulation
of Interest.

rendered it possible for the king to have recourse openly to such of his subjects as were willing or could be compelled to lend. With the opening up of fields for investment the taking of interest gradually came to be no longer regarded as sinful, but only as needing legal regulation. For at first there was naturally no real comprehension of the relation between the employment of capital and the rate of interest, and the latter was spoken of as a sort of arbitrary compensation to the man who having money was in a manner obliged to do a good turn to a friend¹. Thus, although a law of Henry VII (1488) forbade all lending of money on interest, under Henry VIII (1545) interest was allowed at ten per cent. This permission was withdrawn in 1552, and all taking of interest was again forbidden as utterly prohibited by the Scriptures. This, however, had so little effect in checking the practice that in 1571 the Act of Henry VIII was restored, although any rate above ten per cent. was stigmatized as usury and as forbidden by the law of God. The rate was gradually reduced, in 1624 to eight per cent., in 1651 to six per cent., at which figure it remained till a further reduction to five per cent. in 1714. It is noteworthy that the laws regulating the taking of interest, commonly called the Usury Laws, remained on the Statute Book until 1855.

¹ Cunning-
ham, *Eng.
Ind. and
Com.*
(1885)
p. 338.

Origin of
banking in
England.

The foreign merchants were followed as the king's creditors by foreign princes, including even the Pope, who was among the first to set at nought the Christian feeling about usury; while at home wealthy communities, such as towns and monasteries, were willing to help the king in his necessities. But it was not always so easy to raise money, and then recourse was had to compulsion, and wealthy individuals were made to lend of their accumulated treasure to the king. The advantage of this method was that it caused no widespread discontent in the country. The difference between a forced loan and a benevolence or free gift is not easy to grasp; for a loan taken at the king's pleasure might also be repaid in his own good time, and with a complaisant Parliament to back him the distinction entirely disappeared. But the Great Rebellion deprived the Crown of this means of raising money. Meanwhile, a new source of supply was developing itself. With the increasing facilities for commerce offered by the discovery of the New

World, individual wealth was growing ; and until an extensive system of credit was established, this wealth consisted largely in bullion and precious stones. The need of safety caused the owners to entrust their valuables to the care of the *Goldsmiths*, whose trade rendered necessary the possession of strong rooms. To the valuables were added sums of money on deposit, and the goldsmiths, borrowing the system from Holland, turned to the profitable trade of banking. They paid six per cent. on the loans of their customers, and made their profit partly by picking the best coin and melting it down for export, partly by short loans to merchants, like the bankers of the present day. After 1640 their business much increased. Hitherto merchants had kept large sums of ready money at the Mint, which was then in the Tower of London. But a few months before the meeting of the Long Parliament Charles I, among other expedients for raising money, seized a sum of £130,000 deposited there, with a promise of repayment six months hence. The matter was compromised ; but henceforth the only secure place of deposit was with the goldsmiths. Under the Commonwealth the government was largely carried on by loans, which were chiefly raised from the goldsmiths on the security of particular branches of the revenue. The system was continued after the Restoration, until in 1672 Charles II closed the Exchequer, that is, suspended repayment to the goldsmiths, the largest creditors of the Treasury, to the amount of £1,300,000. These were unable to answer the demands of their depositors, and were obliged to declare themselves bankrupt. But the consequent distress was so great that, despite the best efforts of the Crown to escape from the necessity of repaying the goldsmiths altogether, it was obliged at last in 1701 to acknowledge the debt, and to take means, in a manner which will presently be noticed, to satisfy the surviving creditors.

The thorough distrust in the government which these proceedings had engendered, was increased by the political uncertainty which prevailed for some years after the Revolution of 1688. The ministers of William III found it almost impossible to raise money on a sudden emergency, and resort was had to all kinds of expedients. The idea of a national bank had been mooted for some time, on the analogy of the

The Bank
of England.

Bank of Genoa, which had existed for three centuries, and the Bank of Amsterdam, which was founded at the beginning of the seventeenth century. The scheme as it was adopted, was submitted by its founder, a Scotchman named William Paterson, in 1691; but it was not till 1694 that it was put into practice by Montagu. The plan appealed solely to the monied interest, and consequently only just escaped wreck in the House of Lords. But among the merchants of the City it met with immediate success, and the whole capital of £1,200,000 was subscribed in ten days. The interest was eight per cent., secured on a new tax on the tonnage of ships; and the subscribers were allowed to take up the work of the goldsmiths and to act as a bank of deposit and loan. The novelty of this method of raising money lay in the fact that not only no stipulation was made for the repayment of the principal, but it was definitely understood that the interest paid by the government was to be a more or less permanent charge. In other words, this was the beginning of the *National Debt*. The justice or injustice of burdening posterity with the repayment of debts incurred for present purposes must be left to treatises of economics or practical politics. Here may be noted the historical facts that the monied classes were enlisted on the side of William III, who was enabled to raise loans without any of the disaffection which would have accompanied heavy taxation; that government securities now became a safe and popular investment; and that thus a great inducement was given for the accumulation of capital. But the Bank of England was almost wrecked at the very outset of its career through the hostility of the goldsmiths and the landed gentry. The former, not unnaturally jealous of the new rival, took advantage of the scarcity of metal money which preceded the recoinage of 1697, and accumulating a large quantity of the bank's notes, presented them for immediate payment. By the patriotic efforts of the proprietors all genuine claims were met, and the satisfaction of the goldsmiths' demands was delayed until the new coinage had been issued. It was exactly a century before the Bank was again placed in a similar predicament, and on the next occasion (1797) Parliament came to the rescue and exonerated the directors from paying their claims in cash. The bank notes thus became legal tender;

nor were cash payments resumed until 1819. The landed gentry in the crisis of 1697 took the opportunity of the Bank's inability to negotiate a fresh loan for the king, to revive the project already mooted by Chamberlayne in 1693 of a Land Bank, that is, one whose liabilities should be secured on investments in land. The government, in its desire to propitiate the Tories, turned a favourable ear. But the crisis of 1697 had already shown the necessity of a bank reserve in forms that can easily be realized. Land is of all things the most difficult to dispose of at a moment's notice. Consequently, quite apart from the fact that the projectors of the Bank enormously overcalculated the value of land, the classes whom it was intended to serve refused to subscribe, the government obtained no benefit in the shape of the expected loan, and the whole scheme fell through.

It has been said that the National Debt originated in the loan to government in return for which the subscribers were allowed to enrol themselves as a corporation with the title of the Bank of England. To this was added in 1698 a *loan of £2,000,000 from the new East India Company*, in return for its charter. The government indebtedness was further swollen by the ultimate acknowledgment of the *claims of the goldsmiths*, against whom Charles II had closed the Exchequer. These were compounded for in 1706, and the principal added to the general debt. A fourth definite item was formed by the *stock of the South Sea Company* which, on the bursting of the South Sea Bubble in 1721, was taken over by the government. But this stock or capital had itself represented a floating debt (that is, one payable on demand of the creditor) of some £10,000,000 raised during the early years of the War of the Spanish Succession. In 1711 Harley had induced these creditors to allow the debt to be 'funded,' that is, to leave the capital permanently with the government, and to accept an annual interest secured upon the customs. In return for this they were formed into a company for exercising all the privileges of trade which Spain granted to England at the Treaty of Utrecht. This operation was repeated in 1720. All the existing government creditors, whose claims amounted to about £32,000,000, were offered the alternative of payment or shares in the South Sea Company. The government thus gained the advantage of

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National
Debt.

having one creditor instead of many. But more than this: for so eager was the company to obtain all the credit of the government in order to extend its operations, that it engaged to receive from the government the lower rate of interest of five per cent. on the capital taken over, instead of the seven or eight per cent. at which the loans had originally been contracted. These loans had been and continued to be raised in two ways—redeemable annuities, of which something will presently be said, and *irredeemable or perpetual annuities*, of which the government engaged to pay the interest, but made no stipulation as to the repayment of the principal. The consolidating policy of 1711 and 1720 was repeated in 1751; the floating debts were funded, but the fund so formed was now kept in the hands of the government, bearing the low interest of three per cent., and was the beginning of what we now call 'Consols.' The policy of the government has been severely criticized, for in order to diminish the interest, it fixed a low rate at which it was willing to borrow, and offered its nominal £100 stock at the price which investors would give for it. Thus, when the credit of the government stood at five or six per cent. it offered three, and in consequence obtained only £50 or £60, while it left posterity to discharge the debt by payment of £100. This system of raising money was begun under George II, and the extent to which it was carried may be illustrated by the fact that between 1793 and 1815, while the average price of three per cent. consols was 65, the addition made to the National Debt under this head was £400,000,000, for which the government actually received £260,000,000. Financial writers have pointed out that not only was the nation thus made liable to pay money which it never received, but it deliberately debarred itself from cutting down the interest in the future. The system has found a defender in Professor Thorold Rogers, who urges that, besides being an easy mode of borrowing (which some writers regards as 'a questionable advantage'), had the investor suspected that the interest would on the first opportunity be reduced, he would have demanded eight or ten per cent., whereas he was willing to take what was practically six per cent., since he paid £50 for £100 worth of stock. The government could redeem at par, and it was only fair that the investor should have some advantage for the convenience which he

afforded to the government at the time when the loan was raised, as against the inconvenience which might be occasioned by throwing a heap of money back on his hands at a time when he did not want it. Two other methods have been employed at various times for adding to the permanent debt. In 1694 a system of *lotteries* was introduced, by which part only of the money subscribed was distributed among a small number of the ticket holders. It was discontinued after 1823. A far more important portion of the present debt is formed by the *terminable annuities* introduced in 1808. The object of this method of raising money is that while a larger annual interest is paid, the principal lapses to the government either on the death of the investor or a certain number of years from the time of the investment. At first, owing to careless miscalculations, these annuities resulted in large losses to the government, but this was remedied in 1828, and nearly £80,000,000 of the present debt is held under this head.

All the methods of borrowing hitherto enumerated have formed part of the funded debt or government stock. A far smaller but an appreciable item of the whole is formed by the *Unfunded or Floating Debt*, the redeemable annuities lately mentioned. This consists of temporary loans raised upon the security of Exchequer Bills, that is, promissory notes issued by the Treasury under the authority of Parliament, which bear interest from the day of issue until that of payment, and are then either discharged or renewable. They were first issued in 1696 to supplement the scarcity of metal money at the time of the recoinage; and being made receivable in payment of taxes, and thus guaranteed against risk of depreciation, they form a good investment for capital which may at any moment be required, and are consequently in much commercial demand. The amount so issued varies enormously from year to year, part of it being sometimes funded and thus made into perpetual annuities.

From the very commencement of the National Debt prophecies were frequent of its fatal and ruinous influence. The names of Davenant, Bolingbroke, Hume, and Chesterfield may be enumerated among the large number of statesmen, economists and historians who alike shared this view. And the rapidity of its growth afforded them considerable justification. At the end of William III's reign it amounted to over

£16,000,000, and absorbed one-third of the entire revenue in payment of interest; at the Treaty of Utrecht (1713) it stood at £54,000,000. At the Peace of Aix-la-Chapelle (1748) it had risen to over £78,000,000; at the Peace of Paris (1763) to £139,000,000, and the interest took £4,800,000 out of an entire revenue of £8,500,000. At the Peace of Versailles (1783), which ended the long contest with America and the European league which grew out of it, the debt touched nearly £270,000,000, and cost more than £9,500,000 out of a total revenue of £13,000,000. It is to the French Revolutionary and Napoleonic Wars that we must look for the growth of the debt to its present gigantic dimensions. The twenty-two years of war (1793-1815) added no less than £620,000,000 to the liabilities of the government, and at the end of the struggle the debt stood at £885,000,000, and its interest swallowed up nearly £30,500,000 out of a revenue of £71,000,000. Since then, owing to a long period of comparative peace and the efforts of financiers, the debt has declined by nearly £200,000,000, and since the revenue has enormously grown, the proportion between the interest on the debt and the revenue has also declined to one-third. It would, however, be a great mistake to suppose that no efforts at reduction were made before the present century. It was the constant recurrence of long periods of war which made such attempts unavailing. The subject, however, will not be complete without a short glance at the chief methods employed with this object.

Attempts
to reduce
the
interest.

It has already been noticed how Harley was led to fund the floating debt, and to transfer it to the capital of the South Sea Company, partly with the object of paying a decreased rate of interest, which the company were willing to accept. This system was adopted by Walpole, who thus strove to diminish, at any rate, the annual charges on the country. As the credit of the government improved, those who had lent money at a now abnormal rate were offered the alternative of payment of their money at par or its refunding at a lower rate of interest; and those who chose the former were paid off with money borrowed at the newer and lower rate. It was by this means that Walpole turned the greater part of the existing debt into a four per cent. stock (1717), and although his successors generally preferred to raise their loans by the wasteful means

already described, and so to preclude all possibility of repayment, they occasionally betrayed their knowledge of a more enlightened policy by recourse to his system of lessening the interest on the whole amount. Thus, in 1751 the 4 per cents. were reduced by Pelham to $3\frac{1}{2}$, which was followed in 1757 by a further reduction to 3. It was used more frequently in the second quarter of the present century, and its latest and greatest effect was produced by Mr. Goschen in the budget of 1887-8, when the 3 per cents., which composed seven-eighths of the Funded Debt, were reduced to $2\frac{3}{4}$, and ultimately to $2\frac{1}{2}$, and an immediate annual saving was effected of nearly £1,500,000, with an ultimate gain of twice that amount.

The schemes for reducing the principal of the debt have naturally been more varied. The earliest of these was the formation of a *Sinking Fund*, and was also due to the initiative of Walpole (1716). The taxes appropriated to the payment of the interest of the debt yielded more than what was sufficient for that purpose. The surplus was to be set aside annually and allowed to accumulate, until it was sufficient to pay off or at least to materially reduce the debt. But the possession of a treasure was too tempting; on the first necessity a dip was taken into it, and by 1735 the whole had been gradually dissipated. In 1786 the younger Pitt adopted, but without public acknowledgment, a similar scheme which had been propounded by Dr. Price in 1771. According to this, a portion of the surplus, fixed at £1,000,000, was appropriated to the annual purchase and extinction of stock, and was vested in special commissioners in order to guard against its misappropriation by the government of the day. During the time of peace and commercial development which succeeded the American War, this worked extremely well; and by 1793 the debt had been diminished by £10,000,000 at a quicker rate than ever before. But the system was regarded as possessing some inherent virtue; and on the outbreak of the French War, with the diminution and even disappearance of the surplus revenue the Sinking Fund was maintained; money was borrowed at high rates of interest, and part of the sum was applied to the extinction of a debt which bore a much lower rate. This ruinous system continued until 1828. A somewhat similar though not equally pedantic scheme is the

Attempts
to reduce
the capital.

application of all surplus revenue to the extinction of debt. By recent statutes this becomes the duty of every Chancellor of the Exchequer; and the National Debt is now paid off at the rate of £5,000,000 annually. The last method to be noticed, and the one which has found especial favour with Mr. Gladstone, is the *conversion of perpetual into terminable annuities*, or, what comes to the same thing, the raising of money on terminable annuities with which to pay off the principal of the perpetual annuities. This may be regarded as the antithesis to the first-mentioned policy; for it increases the interest for a time in order that after that time its payment may altogether cease, and the capital be thus extinguished or deducted from the sum total of the debt.

The system
of national
expendi-
ture.

Collection.

§ 81. Something should be said, in conclusion, of the methods by which at various times the revenue and taxation have been collected and their expenditure controlled. The first point—the collection—need not detain us long. Since all public moneys were at the disposal of the Crown, it was natural that their collection should be the business of the royal sheriffs. The uses to which they put the power have been already noted, and were the reason for the appointment of special officials for the purpose. At the present moment the revenue is collected by four great departments of the Treasury—the Commissioners of Customs, who find their origin in the Customers appointed under Edward I; the Inland Revenue, which began with the taxation of moveables and, under Henry III, was placed in the hands of temporarily but specially appointed officers; the Post Office, which was not organized till the reign of Charles II; and the Commissioners of Woods and Forests, who superintend the now entirely surrendered crown lands.

Issue and
Audit.

When the financial system of the country was first organized by the Normans, the Exchequer was divided into two courts—the Upper or Exchequer of Account, of which more presently, and the Lower or Exchequer of Receipt. It was to this latter court, consisting of the Treasurer and one or two Chamberlains, that the collected revenue was *paid in*; and the money was acknowledged by a system of tallies or notched sticks split in two, of which one half was taken away by the payer and the other half lodged in the Exchequer. The money

was *paid out* in accordance with a royal order which, as a slight check upon the king, required the authentication of the Great or the Privy Seal; and the record of the issue was styled the Pells of issue, from the parchment rolls on which it was entered. The *audit* of these moneys lay at first with the Upper or Exchequer of Account, and then with its legitimate successors, the Treasurer and Barons of the Exchequer. But with the accession of the Tudors the whole system of issue and audit was revised. The *issue* of public money and the duty of keeping the account of it were placed in the hands of four new officers, called Tellers. The Chamberlains became merely honorary officials, though they lasted as long as the system of receipt by tallies, which it was their sole business to prepare and keep. On the other hand, the Treasurer's clerks developed in importance, one becoming the Auditor of Receipts, whose chief duty, however, was connected with the issue of money; and another Clerk of the Pells, who kept the records of both the receipts and issues of money at the Exchequer. The money continued to be paid out by the king's command, authenticated by letters patent or by writ under the Privy Seal; and as a further security there grew up 'a complicated system of Treasury warrants, known as "the course of the Exchequer".' After the appropriation¹ of supplies had under Charles II become a recognized principle, and especially dating from the Revolution of 1688, the whole system of issue centred round the Auditor of Receipt, whose authorization of the Treasury warrant was necessary before the Tellers could unlock the chests at the Exchequer, where the collected revenue was deposited, and hand it over to the credit of the department for which it was allowed, at the Bank of England. On the accession of George III the Crown surrendered the management of all the royal domains in return for a Civil List of a fixed amount. It thus ceased to take any personal interest in, and therefore to exercise any control over the Treasury. At the same time, the ministries of the first ten years of George's reign changed rapidly, while large sums of money had to be raised for the American War. The result was disastrous on the financial system of the country. Offices were paid by fees which realized an enormous sum, and the duties were discharged by deputy. The Paymaster

¹ Anson
*Law and
Custom of
Const.* ii.

313.

of the Forces and the Treasurers of the Navy and the Ordnance kept in their hands the money voted for their respective services, and their delay in accounting for its expenditure rendered an efficient audit impossible. Attempts were made to remedy these evils. In 1783 measures were taken to prevent ministers from keeping money in their hands unaccounted for; while salaries were fixed in amount and secured upon certain branches of the revenue, which in 1787 became the Consolidated Fund. Moreover, in 1785 the Auditors of Imprest, who had superseded the Barons of the Exchequer in the reign of Elizabeth, were abolished in favour of a board of five Commissioners of audit. But further changes became necessary. The arrears left by the Auditors of Imprest were so great that it was more than twenty years before the new Commissioners overtook them and got abreast of their work; while Lord Grenville's conduct in 1806 in attempting to retain the non-political office of Auditor of Receipt with the post of First Lord of the Treasury, together with his subsequent use of the Auditorship, when in opposition in 1811, to thwart the ministers over the Regency Bill, proved that the system of which that office was the centre, 'was not very valuable as an administrative check, though it might serve the purpose of political obstruction'.

¹ Anson,
*Law and
Custom of
Const.* ii.
p. 316.

In 1834 came a complete reorganization. The Exchequer was abolished together with all the sinecure offices which had grown up around it. All payments hitherto made to it and not direct to such officials as the Paymasters and Treasurers mentioned above, were now made to the Exchequer account at the Banks of England and Ireland by a new official, the Paymaster of the Civil Service, who two years later became a Paymaster General, and included in his functions the moneys hitherto set apart to special officials for the army and navy. The place of the Auditor of Receipt and the Clerks of the Pells was taken by the Controller General, a non-political official, without whose authority no money was to be issued from the Exchequer account at the Bank of England. Until 1866 the audit was in the hands of the five Commissioners; but the final change to the modern system was made when the duties of the Controller General and the Commissioners of audit were both made over to one official, the Comptroller

and Auditor General, whose functions have been described as magisterial, in that he authorizes the issue of money to the proper department ; and judicial, in that he sees that the money issued has been properly expended. Of all this he has to make an annual report to Parliament, which thus learns that the money originally voted has been regularly collected, issued, and expended according to the intention of the taxpayers acting through their representatives.

CHAPTER XI.

THE CHURCH.

The
Church as
a Corpora-
tion.

§ 82. THE question of the continuity of the English Church has become the badge of ecclesiastical party politics. It is no part of the business of this book to trace the varying fortunes of ecclesiastical history in England. Our business is with the structure of ecclesiastical organizations and their more permanent relations to the world around. Thus, without pre-judging the question of continuity, it will be convenient to take the Reformation settlement as a dividing line, and to examine: (1) the position of the corporate body of the Church itself; and (2) the relations of Church and State before and after that momentous period. In this way it will be most clearly apparent what changes exactly were produced in the sixteenth century by the repudiation of the Roman authority; and thus indirectly materials may be furnished for answering the question of the origin and antiquity of the English Church.

The consideration of the Church as a corporation involves a description of (i) the various classes of churchmen, and (ii) the methods of self-government of the Church. Constitutionally the orders of which the ecclesiastical organization was composed were the bishops, the secular, and the regular clergy, strictly speaking a cross division, since the bishops were drawn from the secular and regular clergy alike.

Classes of
Church-
men.

(1) Bishops.

At the time of the Reformation, ecclesiastical England was divided into two archiepiscopal provinces and eighteen episcopal dioceses. This division had of course been of gradual growth. For the first century after the spread of Christianity among the English (597-668) there were eight dioceses among the English kingdoms, and Canterbury was regarded as the

metropolitan. But, in the year 735, at the advice of Bede, the holder of the See of York obtained from the Pope a pallium which secured his recognition as a metropolitan also; while for a short period (787-803), owing to the influence of Offa of Mercia, Lichfield became a third archbishopric for Mid-England. The organizing work of Theodore of Tarsus (668-690) included the division and extension of the existing episcopate. He formed seven new dioceses and left Wessex to Winchester alone, although shortly after his death two more bishoprics were added for Wessex. The only further additions of Anglo-Saxon times consisted of three more West-Saxon Sees which owed their foundation to Eadward the Elder. But in consequence of the Danish invasions, of the twenty bishoprics four or five became extinct altogether, while others disappeared for a time, and in some cases the bishop's stool or residence was continually transferred from one place in his diocese to another. This compulsory migration had no effect of itself upon the administration of the diocese, for the bishops were rulers of tribes or districts, not (as abroad) of towns; and their residences were often mere villages, places of retirement, not centres of activity. The Norman Conquest wrought considerable changes. The episcopal system was brought more into harmony with foreign usage by the transference of the Sees to large towns: several new Sees were created to supply the place of those which had become extinct: foreigners of learning were appointed to vacant bishoprics. But the increase of the intellectual standard scarcely compensated for the natural alienation of the bishop from his flock, or for the inevitable tendency of the high offices in the Church to become more and more the rewards of political service. A more remote change effected by the Conquest was the settlement of the question of precedence between Canterbury and York in favour of Canterbury. A word of explanation is necessary. The original scheme of Pope Gregory gave twelve suffragans apiece to Canterbury and York, and included Scotland in the province of the northern archbishopric. But the Danish invasions for a time swept away even York itself, and on its restoration its sole suffragan was Durham. Meanwhile, the Archbishop of Canterbury had superseded the West-Saxon bishop of Winchester as the chief adviser of the crown, and the temporary

extinction of York had set aside all question of precedence. But for the last half century of Anglo-Saxon rule, York, in common with all Northumbria, enjoyed a position of semi-independence; and the public position which was accorded to Archbishop Ealdred, owing to the maintenance for political reasons of the uncanonically appointed Stigand at Canterbury, put York again on a position of equality with the latter. Ealdred's foreign successor, Thomas of Bayeux, appealed to the Pope against Lanfranc's claims; but the matter was referred to the Witan, which decided against York and ordered the holder of the See always to make profession of obedience to Canterbury. The quarrel, however, continued, and was not fairly settled until Archbishop William of Corbeil (1123-1139) accepted the office of Papal Legate. But it is to be noted that he then took precedence of York not in the capacity of *Papa alterius orbis*, as the Pope had styled Anselm, but as the servant and local representative of Rome.

The clergy as a body were divided into two great sections: (a) the seculars or parish priests, bound only by their ordination vows; and (b) the regulars, namely monks and friars, bound by some special rule in addition to their ordination vows. For the sake of completeness, mention should be made of two other bodies, which cannot be classed definitely under either head—the capitular clergy, who were seculars living under some rule, and the religious military orders.

(2) Secular clergy.

The division of England into parishes was not begun until the time of Theodore. Under his organizing hand the township became the parish, and the chaplain of the local thegn became the *parish priest*, as the chaplain of the king became the bishop. The patronage was naturally left to the landowner who had endowed the priest with *glebe* land and acknowledged his claim to *tithes* of produce; while all the parish contributed on occasion to the *fees* which were exacted for the spiritual services of the church. The glebe was probably taken in strips among the common fields of the village. The obligation of tithe was probably at first voluntarily acknowledged by the landowners, then enforced with spiritual penalties by the Church, and was paid in the first instance to the bishop, who distributed it among the several parishes of his diocese. The fees included such items as *cyricsat*

or first-fruits paid by every householder, and *sawlsceat* or mortuary dues. Mediaeval England contained about 8000 parishes, and the priest was a man of considerable authority within the local area. His Anglo-Saxon title of *mass-thegn* ¹ *Sel. Chart.* p. 66, § 5. indicates the social class with which he was ranked, and in the village communities he accompanied the reeve and four men of the township as representatives of the local interests in the hundred and shire moots². In nothing perhaps is the provinciality which the English Church shared with the English Nation, so marked as in the fact that nearly every parish priest was a married man; and that, notwithstanding the canon against the ordination of the son of a priest, before the Norman Conquest there was a great danger in England of the formation of an hereditary clerical caste. After the Conquest, when Lanfranc, in accordance with the views of the reforming party throughout Europe, introduced celibacy, the previous ill-success of the efforts of the party identified with Dunstan caused him to move most cautiously in the matter. According to the Roman view, all sacraments performed by a married priest were ipso facto null. Lanfranc contented himself with leaving married secular priests in their benefices, while for the future he forbade priests to marry or married men to be ordained. The feudal ideas of the Normans wrought a still more important effect on the position of the parish priest. Even before the Conquest pious patrons had bestowed upon monasteries of especial fame the advowson of, or right of presentation to, a benefice which was often situated at a distance from the monastery itself. This privilege of patronage, with its attendant duty of protection, passed before long into a right over the benefice; and the monastery, while appropriating to itself the greater tithes of corn and wool, supplied the spiritual duty by a curate, for whose support were reserved the lesser tithes and all fees for the offices of the Church. The revival of monastic life caused a very rapid spread of this most harmful method of endowment; and the country was covered with benefices whose patrons had none except a pecuniary interest in the parish. Besides the beneficed clergy and their curates there was a class of seculars known as *Chantry priests*. These were attached to cathedrals or parish churches, or ministered in chapels belonging to great houses. Their sole work being to

say masses for the dead, they were both practically exempt from episcopal supervision and amenable to no 'rule.' The majority of men admitted to orders must have been ordained to such posts, and consequently they were the most worthless of all the mediaeval clergy.

(3) Regular clergy.

Monks.

Before the Norman Conquest.

In turning to speak of the regular clergy, it is necessary to remember at the outset that MONKS were not necessarily in full orders either as priests or deacons. They were originally communities of laymen who cut themselves off from the world for religious contemplation. The temptations which naturally beset so idle and unrestrained a life led to the formulation of various rules, that of Benedict of Nursia being the most universally accepted. These communities, so organized, freed themselves from parochial control by obtaining the ordination of some of their members, and from episcopal supervision by placing themselves directly under the patronage of the Pope. They thus practically formed a papal garrison in every European country. In England, as elsewhere, the conversion of the people was accomplished by communities of monks, and for the first two centuries they were the most prominent element in the local Church. The popularity of the monastic life both multiplied monasteries and filled them with inmates of noble birth, whose presence brought insincerity of purpose, relaxation of rules, and a generally luxurious and idle mode of life. Learning, which had practically only been kept up in the larger monasteries, disappeared; and the Danish invasions destroyed the monasteries and scattered the monks. When Ælfred began a monastic revival with the erection of the monastery of Athelney, in memory of his deliverance from the Danes, the old English predilection for monks had quite died away, and he was obliged to seek for inmates in foreign lands. Eadred (946-955) gave a further impetus to the revival by the refounding of Glastonbury and Abingdon; and under Eadgar the Benedictine rule was first brought from Fleury in Flanders. This revival is generally associated with the name of Dunstan, of whose actual share in it two very opposite opinions are entertained. Whether Dunstan himself or his purely ecclesiastical friends, Æthelwold and Oswald, were the moving spirits, the extent of the movement was limited both by Dunstan's own position at the court, which forced him to take account of more

than merely ecclesiastical reasons, and by the strong influence already noted of the married secular clergy. Moreover, whatever may have been the immediate success of the reforming movement, it took no real hold of the country. Indeed, the only kind of discipline which at all succeeded in England before the Conquest, was that of Chrodegang of Metz, introduced by the Lotharingian prelates whom Godwine's family supported as a counterpoise to Eadward the Confessor's French and Norman bishops. This planted round a cathedral a body of secular canons, that is, secular clergy living in a common dormitory and feeding at a common table. Such, for example, was Harold's great foundation of Waltham.

With the Norman Conquest a great impetus was given to monastic life. Dunstan had already begun the practice of associating a cathedral chapter with a local monastery. Lanfranc's monkish instincts prompted him to encourage this peculiarly English system by introducing it into his own monastery of Christ Church, Canterbury; while he lent his influence to defeat the attempts of Bishop Wakelin of Winchester in behalf of secular canons. At the same time, monasteries which were not connected with a cathedral struggled to free themselves from episcopal jurisdiction. The origin of this evil lay perhaps with the king himself, for William I exerted himself to procure such exemption for his own foundation of Battle Abbey. In this he had not the support of his primate; for Lanfranc, though a monk, was also a bishop, and meted out heavy punishment to the monks of St. Augustine's, Canterbury, who claimed this very privilege for themselves. But the papacy gave every facility for the growth of these exemptions; and in the case of England it found assistance in the fact that, for some time after the Conquest, the monasteries were hotbeds of national feeling. The increased connexion of England with continental Europe led to the introduction of many of the new monastic orders to which the religious revival of the tenth century had given rise. The only rules known in England before the Conquest were that of St. Benedict of Nursia, whose followers were 'regulars' and were known as Benedictines; and that of Chrodegang of Metz. The orders which were represented in England after the Conquest may be classed as either Augustinians or

After the
Norman
Conquest.

reformed Benedictines. The *Augustinians*, or canons regular of the Order of St. Augustine, known from their dress as the 'Black Canons,' were a cross between the regulars and seculars; for, being in origin secular—a protest against monasticism—they leaned constantly towards monastic ways. They spread all over England, and devoted themselves to the work both of the schoolmaster and the nurse. The Augustinian rule supplied the model to two other orders. The more important of these were the military orders of the religious, of which two were found in England—the *Knights Hospitallers* of St. John of Jerusalem, who were established at Clerkenwell in 1100, and whose Grand Commander in England became in rank the first lay baron of the realm; and the *Knights Templars*, who were established at the Temple in London at the beginning of Stephen's reign. Both orders grew rapidly in wealth, while their rivalry was sufficiently bitter to array them not infrequently in arms against each other. The career of the Templars was brought to an end by Edward I: the members resident in England were seized in 1308 and their lands confiscated, and in the following year Pope Clement V abolished the whole order. The Hospitallers enjoyed a longer existence; for, being driven from Jerusalem, they became knights of Rhodes till the conquest of that island by the Turks in 1552, when they retired to Malta. Until the Reformation their Grand Master continued a member of the House of Lords. The second offshoot of the Augustinians were the *Premonstratensians*, or 'White Canons,' who came to England in 1140 and occupied thirty-five houses, remaining until 1512 under the direct jurisdiction of the parent house of Premontr  or Premonstratum in the diocese of Laon. Of the *Reformed Benedictines* three branches spread themselves into England. The first in order of time were the *Cluniacs*. This was the earliest example of an order within an order; for it was a completely separate organization within the Benedictine rule, and it possessed a large number of dependent houses scattered through Western Europe, all under the government of the Arch-Abbot of Clugny. The order came to England in 1077. It held about forty houses, most of which were founded before the accession of Henry II, the chief of them being Lewes Priory: they were all governed by foreigners, and were full chiefly of foreign

monks : they sent contributions to the parent monastery, and were only able to be visited for supervision by the foreign heads of their order. As a consequence, during the wars with France they were liable to be seized into the king's hands as alien priories. The smallest branch of the Reformed Benedictines in England were the *Carthusians*, who came about 1180 ; but they only possessed nine houses, the chief of which was the London Charterhouse, founded by Sir Walter Manny in the reign of Edward III. The largest branch, on the other hand, was supplied by the *Cistercians*, who arrived in 1128 and became both numerous and wealthy. They settled in solitary places, where they carried on their great industry of sheep-farming. At the dissolution of the monasteries, of their seventy-five houses no less than thirty-six were among the greater monasteries. They held in addition twenty-six nunneries. The only other order which needs notice is that of the *Gilbertines*, an offshoot of the Cistercians and the one purely English monastic order. It was founded in 1139 by Gilbert of Sempringham as a double order for men and women, and it possessed twenty-six houses, of which four at the dissolution ranked with the greater monasteries.

Early in the thirteenth century, to the monks were added Friars. They consisted originally of the two well-known orders of *Dominicans*, or 'Black Friars,' founded by a Spaniard as a great order of preachers ; and *Franciscans*, or 'Grey Friars,' also called Minorites (i. e. less than the least), founded by an Italian for work among the destitute. Both these orders arose within a few years of each other ; and under the patronage of Pope Innocent III they spread into almost every country of Europe. At the outset they were devoted to a life of poverty : their friaries were the meanest possible buildings ; and all learning and books were forbidden them. They entered England—the Dominicans in 1219, the Franciscans in 1225—and both soon obtained settlements in all the chief towns. Their singular self-devotion speedily made them popular, and their popularity caused the rise of other orders. The multiplication was only checked by the Council of Lyons in 1274, which not only forbade such increase, but actually suppressed the Friars of the Sac and confirmed only the Augustinians or Austin Friars and the Carmelites among the additional orders.

Their popularity also brought immense wealth; but since it was unlawful for the orders to hold possessions, donations of lands and goods were made to corporations of towns to hold to their use. The next departure was more necessary but none the less subversive of the original intention of the orders; for, their work both in combating heresy and in tending the sick forced them to the acquisition of knowledge. They plunged into philosophy and natural science with such success that it was their ranks which supplied all the great names in the last period of mediaeval thought. Their influence in England was striking and peculiar. For the first half century of their existence they were found in alliance with those classes which were most at variance with Rome, and engaged in the struggle for English liberty. Later on, however, they reverted to their original position of strenuous supporters of the papacy, and became the most powerful agency in the denationalization of the English Church which characterized the middle of the fifteenth century. In the same way, at the outset of their career their chief work lay among the rising merchant class, whose heretical tendencies they met with their scholastic learning; and among the destitute, who welcomed the medical knowledge which they brought to the relief of foul disease. But with the accumulation of wealth their thirst for knowledge decayed, and they gradually abandoned their work among the poor, rivalling the monks themselves in idleness and luxury. Meanwhile, they undermined the influence of the parish priests, for their irresponsibility to the bishop enabled them to creep in everywhere, and their cunning gave them almost a monopoly of the confessional.

Government of
the Church.

§ 83. The *government of the Church as a corporation* involved the power of legislation which was carried out by ecclesiastical councils, and of jurisdiction which was the work of the ecclesiastical courts.

Ecclesiastical
Councils.

The *Ecclesiastical Councils* of Anglo-Saxon times were either national synods of the whole Church or provincial assemblies of Canterbury and York respectively, and consisted always of bishops, with an occasional addition of abbots. In his organization of the Church, Theodore provided for the annual meeting of a synod at Clovesho, somewhere in the neighbourhood of London. Councils are frequently mentioned, but they were

neither regular nor annual: they were often attended by kings and ealdormen, and in their discussion and legislation the ecclesiastics carefully avoided any interference with secular law or custom. After the Norman Conquest the organization was extended to the gathering of diocesan synods, which, like the shire court in lay matters, were exhaustive assemblies of the local clergy. So long as separate assent was required, these bodies were separately consulted, and at a later stage it was in them that the representatives for the higher assemblies were chosen and the grievances of the local clergy were drawn up. Such grievances were submitted to the provincial synods, which continued to be held very much on the model of Anglo-Saxon times. The second of William's *Consuetudines* forbade any assembly of the bishops 'to enact or prohibit anything but what was agreeable to his will and had first been ordained by him'¹; while under Henry I the Archbishop of Canterbury held his provincial assembly at the same time as the king held his Court. Thus, although in the anarchy of Stephen's reign the ecclesiastical councils alone deserved the name of national assemblies, the power of these assemblies under the Normans and early Plantagenets was considerably circumscribed. For, in the *first* place, so entirely did their power of legislation in matters ecclesiastical depend on the acquiescence of the king, that in 1127, although the primate actually held the office of papal legate, the canons needed the royal ratification. In the *second* place, it was not until the power of granting taxes was transferred from the diocesan to the provincial synod (which did not happen till the reign of John) that the clergy as a body could be said to have a voice in the appropriation of their contributions to national purposes. The acquisition of this privilege brought with it the necessity of a representative assembly. As yet the only persons entitled to attend a provincial synod were bishops, as in Anglo-Saxon times, to whom had been added abbots and archdeacons. In 1225 Archbishop Langton for the first time extended the summons to include not only (α) bishops, abbots, priors, deans, and archdeacons, but also (β) proctors or representatives for the cathedral, collegiate, and monastic clergy. But there were two grave defects. In the *first* place, no provision was made for the parochial clergy. The practical results were seen in the

¹ *Sel. Chart.*
p. 82,
Eadmer.

refusal of the bishops in 1254 to assent to a grant of money on behalf of the unrepresented parochial clergy; and in 1283, of an assembly of bishops, abbots, heads of religious houses, and proctors of cathedral clergy, because of the absence of the same important element. In the *second* place neither the number of proctors nor the mode of their appointment was specified. It was not till May 1283 that for the first time the bishops were directed by Archbishop Peckham to assemble the clergy of the diocese, and to bid them elect proctors—two for the parochial clergy and one for each cathedral and collegiate chapter. The result was the formation in each province of a completely representative synod or *Convocation*, which moreover became a permanent assembly. The constituents of the two Convocations slightly differed. Thus, to the Canterbury assembly there came in person the bishops, abbots, priors, heads of religious houses, deans of cathedral and collegiate churches, and archdeacons. To these were added as representatives, two proctors for the parochial clergy of each diocese, and one for each cathedral and collegiate chapter: whereas the unit of representation for the parochial clergy of the northern province was the archdeaconry. These two bodies, so constituted, exercised considerable legislative power. Thus, as regards the clergy, it was in these assemblies that the general legislation of Christendom in Lateran and other Councils was accepted as binding on the national Church, and that constitutions affecting the clergy of each province were issued. But the power was by no means unrestrained, for William's *Consuetudines* forbade the introduction of papal bulls without the royal licence¹, while no ecclesiastical legislation was valid apart from the confirmation of the Crown. Convocation even included the laity within the scope of its legislative power in all such matters as marriage, wills, tithe, heresy, slander, usury, and others of a similar character. It is true, however, that these were mostly cases dealt with by the ecclesiastical courts, whose encroachment was prevented by the issue of prohibitions from the courts of Common Law. As far as the legislature was concerned, the acceptance of outside legislation was limited by the Common Law and the Statute of *Praemunire*. At the same time, it is to be noted that Convocation did not necessarily, though it did generally, meet at

¹ *Sel. Chart.*
p. 82,
Fadmer.

the same time as Parliament. Its proceedings, moreover, were seldom interfered with; and after the accession of the House of Lancaster, they were not interfered with at all. Now, although in early days the Church organization had led the way to the unity of the State, the centralization of the National Church itself stopped short at the two provincial assemblies; for the mutual jealousies of the two provinces prevented the convocation of anything like national Church Councils. There were, however, three methods of occasional resort by which for ecclesiastical purposes this separation was overcome—(a) legate Councils such as those in which the Constitutions of Otho were published (1237), and the Constitutions of Ottobon were accepted (1268): (b) conference between the two Convocations, which however was generally done by letter between the two archbishops; and (c) the meeting of the chief ecclesiastics of both provinces in the National Parliaments. Thus in 1207 John summoned the bishops and abbots of both provinces to grant an aid. Nor did this method stop here; for even the lower clergy were sometimes included, as when deans and archdeacons were summoned to the council in which Henry II arbitrated between the kings of Castile and Navarre (1177); or when Simon de Montfort called deans and priors to his Parliament along with the two higher classes of ecclesiastical dignitaries (1265). These formed precedents for Edward I's summons of the clergy of both provinces to form one estate in the National Parliament. But three important *differences* should be noted *between the clergy in Convocation and in Parliament*—(1) it is obvious that, while Convocation consists of two provincial assemblies meeting in their respective provinces, the spiritual estate is one element of a general Parliament meeting at the same place: (2) Convocation is summoned by the writ of the Archbishop addressed through the senior suffragan to each bishop; whereas the representatives of the spiritual estate are summoned by the king's writ direct to each bishop: (3) before the Reformation Convocation contained in the abbots and priors a class which as a class was not included in Parliament.

§ 84. The Anglo-Saxon constitution realized the identity of Church and State in a manner which was not possible again until after the Reformation. Thus, for judicial purposes, the

Ecclesiastical Courts.

Before the
Norman
Conquest.

bishops sat in the local courts and seem to have exercised there the jurisdiction over cases arising out of the disputes and offences of the clergy, together with the morals of the laity, with which they appear to have been especially charged. It is true that besides this the bishops had special jurisdiction in three kinds of cases—(a) in their own franchises, like any other great thegn, by the ordinary legal methods of compurgation and ordeal; (β) a penitential discipline which could only be put into practice by the goodwill of the laity; and (γ) for dealing with the spiritual offences of the clergy, such as heresy or disobedience, for which neither the local court nor penitential discipline were sufficient. In such cases there must have been tribunals answering to the later ecclesiastical courts, of which the executive officer was the archdeacon, who could, however, only exercise his functions by connivance of the secular power.

After the
Norman
Conquest.

William I introduced into England the ideas of ecclesiastical reform prevalent abroad, and with the object of carrying out the theory of entire separation of the organization of Church and State, he issued an Ordinance by which he both forbade the bishops and archdeacons to hold ecclesiastical pleas for the future in the local courts, and promised the aid of the secular arm in the enforcement of their sentences¹.

¹ *Sel. Chart.*
p. 85.

The results of this dualism of Church and State were most important. For the present it is convenient to note the effects upon the jurisdiction exercised by ecclesiastical officers. In the *first* place is to be remarked the growth of *archidiaconal jurisdiction*. Under the Anglo-Saxons each bishop had as his executive officer an archdeacon, who possibly sat in the hundred courts as representative of the bishop. But after William's Ordinance the archdeacon set up his own court; and in order to meet the increase of ecclesiastical litigation, archdeaconries were multiplied. The holders of the office were carefully trained in Civil as well as Canon Law, and they pursued these studies at foreign universities. Thither they were sent at a youthful age, and there they often led such unclerical lives as to provoke the famous mediaeval query, 'whether an archdeacon could be saved.' Moreover, these officials were, as their name implies, kept in deacon's orders, so that priestly hands might not be tainted with the questionable subjects with which the archdeacons often had to deal.

Their constantly encroaching jurisdiction was regarded with apprehension by the bishops, and with detestation by the general body of the clergy. The *second* result—an outcome of the first—was the growth of jurisdiction by *Officials and Commissaries*. For, in order to limit and, as far as possible, to supersede the action of the archidiaconal court, about the middle of the twelfth century the bishop began to appoint his chancellor or chief secretary to a newly created office of official, that is, a judge ordinary to exercise all the jurisdiction inherent in the person of the bishop himself. No appeal was allowed from the official to the bishop, who however generally reserved certain cases for his own personal hearing. The official was at first appointed for the life of the bishop from whom he held his commission; but his position ultimately became permanent. A *third* result of William I's action was the growth of *Peculiars*. Before the Norman Conquest the bishop and cathedral chapter held their estates together, and both the seignorial and spiritual jurisdictions were exercised by the bishop and his officers. But after the Conquest, probably as the result both of long continued disputes and of the reigning eagerness for exemptions, the lands of the cathedral church, together with the spiritual and secular jurisdiction, were all divided between the bishop, the chapter, and even individual members of the chapter. There thus came into existence a number of small ecclesiastical courts known as *Peculiars*, with such administrative jurisdiction as was implied in the right of granting marriage licences, proving wills, hearing complaints, and inflicting penances. Under this same head are to be included the jurisdiction exercised by the greater monasteries and by the king's chapels royal. The *fourth* and final result of William's measure was the growth of *a complete hierarchy of ecclesiastical courts* corresponding to the national organization of township, hundred, and shire. Thus they mounted from (1) the *rural deans*, who only administered custom, not Canon Law; through (2) the *archdeacons*, who possessed a double power both of (a) ordinary ecclesiastical jurisdiction, which differed in each diocese and was often regulated by agreement with the bishop, and of (β) visitation to hear complaints when the bishop did not go round. A parallel to the shire court was found in (3) the *diocesan or*

consistory court of the bishop, which heard cases both in the first instance and on appeal from the archdeacons' courts. This was held by the chancellor as the official principal in each diocese, and from it appeals lay to (4) the *provincial court* of the archbishop alone. Of these provincial courts for the province of Canterbury there were no less than four—(a) the Court of Arches, held at St. Mary-le-Bow (de Arcubus) Church by the official principal of the archbishop, which acted as the court of appeal from all the diocesan courts and as a court of first instance in all ecclesiastical matters, perhaps by virtue of the archbishop's authority as papal legate; (b) the Court of Audience, held at St. Paul's in the jurisdiction of the archbishop and of coordinate authority with the Court of Arches; (c) the Prerogative Court, which managed the jurisdiction with regard to wills; and (d) the Court of Peculiars for thirteen London parishes which were exempt from the Bishop of London's supervision. The Province of York possessed only two courts—the Chancery, answering to the Court of Arches, and the Prerogative Court.

Eccle-
siastical
Law.

From the courts themselves it is natural to turn to the *law administered by those courts*. This came from three sources. The staple part of it consisted, of course, of (1) the *Canon Law* of Rome, which was systematized by Gratian, a monk of Bologna, in his 'Decretum' published in 1151, and to which additions were constantly being made by the popes. The procedure and even the maxims of the Canon Law were largely drawn from its later antagonist, (2) the *Civil Law* of Rome, the study of which was revived in Europe by the discovery of a copy of Justinian's 'Pandects' at Amalfi in 1135. The bitter struggle of pope and emperor, round which the whole history of mediaeval Europe centred, encouraged the refurbishing of these two important weapons by the sides which respectively used them. But neither was received as of any authority in England. Stephen drove out Vacarius who attempted to teach Civil Law at Oxford; and Henry II fought the claims of the Canon Law as personified in Becket. Consequently, no great school of either law was founded in England. Yet the effect of both on English law was considerable. The influence of the Civil Law on English Common Law has been dealt with in a former chapter. The Canon

Law left its mark in no less a degree on national jurisprudence. Nor are the reasons far to seek. For, the only training of the ecclesiastical judges was obtained, as we have seen, in the foreign schools where Civil and Canon Law held complete sway. Thus, where the Common Law neither opposed the principle nor itself provided a remedy, the only appeal was to maxims of the Canon and Civil Law. It is to this fact that we owe our maritime, matrimonial, and equitable law, all of which came from foreign sources. Nor was it an unimportant matter that all appeals to Rome were naturally tried by Canon Law. The result is seen in the fact that at the Universities provision began to be made for the study of the two laws. At nearly every college founded before the Reformation the statutes enjoined the study of the Canon Law by a definite number of the fellows, and that of the Civil Law to supplement it. The only native part of Church law was supplied by (3) the *Provincial Law of the Church of England*, which was itself formed of three elements—the *Constitutions* of successive archbishops from the time of Langton; *Canons* passed in the legatine councils of Otho (1238), and Ottobon (1267), and afterwards accepted by national councils held by Archbishop Peckham; and finally, the *Sentences* or authoritative answers to questions propounded by the popes.

The most important question raised by a description of ecclesiastical courts and law concerns the *persons who were amenable to ecclesiastical jurisdiction*. The claim of the church courts to exclusive jurisdiction over the clergy led to a struggle which will best be dealt with in treating of the relations between Church and State. But these courts claimed also an extensive *jurisdiction over the laity*. This would be based on the necessary cognizance by the moral guardian of all matters involving breach of faith, and it embraced four important kinds of cases. In the *first* place, the jurisdiction over the laity would include the correction of immorality. This was a matter of strong protest; but there was no attempt at its restriction. There was added, *secondly*, the correction of breaches of faith. This was the outcome of the penitential discipline mentioned as exercised by the Anglo-Saxon Church. The penalties were of a penitential nature, but could be commuted for money. The system could only be carried

Extent of
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out by the maintenance of an army of spies and informers: hence its great unpopularity, and hence also the gradual prohibition to the ecclesiastical courts to take cognizance of any breaches of faith which affected contracts between laymen. A *third* class of cases was formed by questions arising out of Wills and Marriages. The former was included in the jurisdiction connected with breaches of faith, and so was appropriated in the twelfth and thirteenth centuries by the ecclesiastical courts: the latter was not disputed or even limited, although the legislation of Henry II removed from the cognizance of these courts all matters relating to dower and legitimacy because they affected the disposition of real property. A *fourth*, and to modern ideas the most natural work of the spiritual courts, was the punishment of heresy. Previous to the time of Wycliffe the cases of heresy are so rare and isolated as not to need notice here. When the question became important it was complicated with parliamentary legislation as to the assistance of the secular arm. The constitutional history of the matter is thus divided into two parts—firstly, the ecclesiastical trial; secondly, the aid given by the state. With regard to the trial it may be said that cases of heresy were seldom, if ever, heard by a court below that of a bishop sitting in person as *inquisitor natus* in his own diocese; and there is no recorded case of appeal in such a matter either to the archbishop's court or to Rome. There was, moreover, such a dislike to extreme proceedings in a matter so difficult of proof, that the methods of trial were as various as the cases tried; until, in 1409, the Constitutions of Archbishop Arundel paralleled it to trials of treason under the Civil Law. But in any case the power of the ecclesiastical judge stopped at a sentence of excommunication. Here, then, the interposition of the secular arm began. This was regulated by three statutes. An Act of 1382, which was passed at Archbishop Courtenay's instigation and in consequence of the Peasant Revolt, ordained that on a certificate from the bishops the Chancellor should issue commissions for the arrest of heretical preachers. But in a later Parliament of the same year the influence of the knights of the shire caused the repeal of this act on the ground that it had not duly passed the Commons. In 1401, Archbishop Arundel procured the passing of the

5 Ric. II.
st. 2. c. 5.

celebrated Act *de haeretico comburendo*, by which heretical 2 Hen. I
 preachers who had been arrested by the bishop and had c. 15.
 refused to recant, should be handed over to the secular arm 2 Hen. V
 and the sheriff should burn them. Finally, by an Act of 1414, c. 7.
 passed by the influence of Bishop Beaufort and in opposition
 to Archbishop Arundel, heresy was made an offence against
 the Common Law: for not only were secular officers to swear
 that they would assist the ecclesiastical officers in the sup-
 pression of heresy, but Justices of Assize were both to have
 the power of inquiry, to issue an order for arrest, and to hand
 over the person to the ecclesiastical courts for trial. The
 results of these attempts at severity were not encouraging.
 On the one side, there were a certain number of executions.
 Already before 1401 a certain Sawtre had been burned: the
 best known of the later victims were John Badby, a tailor, in
 1410, and Sir John Oldcastle (1417). But on the other hand,
 heresy was not stopped, and the Lollards were even encouraged
 by the attacks made by the knights of the shire in 1404, and
 again in 1410, on the temporalities of the Church.

§ 85. In turning to consider the *Church in connection with* Church
the State, the subject may be divided into (1) the influence and Stat
 exercised by the State over the Church, and (2) the attempt in the
 of the Church to stand apart from the State. Middle
 Ages.

The influence of the State was exercised over the Church
 by the maintenance of the *Royal Supremacy*. This may be
 said to have always existed in England, and for historical pur-
 poses may be divided into two parts. On the one side is found
 (a) the king's ecclesiastical prerogative, which was always
 upheld by English law and, under compulsion, admitted by
 the pope. It was asserted by William I in his *Consuetudines*; The Crow
 by Henry I in the compromise which ended the quarrel over and the
 investitures with Anselm; by Henry II in the *Constitutions* Church.
 of Clarendon, and by the Parliaments of the Edwards in the
 successive Statutes *Circumspecte Agatis* (1285), *Articuli Cleri*
 (1316), *Provisors* (1351), and *Praemunire* (1353); while the
 same motive underlay the practice of issuing prohibitions from
 the Courts of Common Law, and the participation of the lay
 authority in the legislation on heresy. But in addition to this,
 there was a side of the prerogative which was (b) usurped by
 the papacy and acquiesced in by the crown. This included

the papal assumptions of patronage by provisions, the hearing of appeals at Rome, and the levy of annates or firstfruits which was begun in 1266 by Pope Alexander IV and was made into a general obligation by John XXII (1316-1334). But the claim of the papacy was at times wider than this. It put forward not only Gregory VII's general claim of the inherent superiority of the spiritual to the temporal power, but a special claim to superiority over England. Gregory VII demanded homage of William I, which was refused. William II and Henry I claimed the right to determine for England between two contending popes. Henry II accepted Ireland at the hands of the pope. His alleged submission of England after Becket's murder was only a submission of himself in a spiritual sense, and the offer of the legateship to him is only a story. It was John's surrender and homage which first created the idea of a feudal relation between the English king and the pope. But this was definitely repudiated by Parliament at Lincoln in 1301, when Boniface VIII interfered on behalf of Scotland; in 1366, when Parliament refused the further payment of John's tribute and even the satisfaction of long arrears; and in 1399, when, in comment on Richard II's application to the pope to confirm the king's unconstitutional acts, it is said that the crown and the realm of England had been in all time past so free that neither pope nor any other outside the realm had a right to meddle therewith.

The exercise of this royal supremacy was chiefly called forth in the part which the crown played in *the appointment of bishops*. Under the Anglo-Saxon kings the general rule seems to have been that bishops were appointed by the king and Witan, of which they were members, in consultation with the clergy and people of the diocese. Like all ecclesiastical business of the time, it was a matter of arrangement between the parties concerned. After the Norman Conquest William I, in the exercise of the royal supremacy, appointed and deposed bishops in the same assembly in which he appointed lay officers; and invested them with ring and pastoral staff, no less than he received their homage and oath of fealty. But the new ultramontane doctrines which insisted on the absolute separation of Church and State, caused a quarrel between Henry I and Anselm over the question of the investiture of

a bishop by the temporal authority with the ring and staff—the emblems of spiritual office. In 1107 a compromise was effected by which the election of the bishop was to be made by the Chapter of the Cathedral, but in the king's court or chapel where the royal influence could be exercised; the bishop paid homage to the king, but received investiture at the hands of the archbishop or the representative of the spiritual authority. Thus the matter remained until 1214, when John, wishing to separate the clergy from the barons, granted freedom of election as a bribe to the Church, by allowing the appointment of bishops to take place in the chapter-house of the cathedral itself. The king, however, still retained a hold on the election by the issue of his *congé d'élire* or leave to elect, and by the nomination by letter of the candidate on whom he wished the choice to fall.

The attempt of the Church to stand apart from the State is embodied in the struggle for what were comprehensively called *Clerical Immunities*. They included immunity from two things: (a) lay jurisdiction; (b) lay taxation. The claim put forward by the church courts for exclusive jurisdiction over the clergy was of course the direct result of the separation of the lay and ecclesiastical courts by William I, and was fostered by the increased study and formulation of the Canon Law. It included a claim of jurisdiction not only for breaches of ecclesiastical law, but even for offences committed by the clergy against the Common Law. Further than this, the bishops, as ancient protectors of the clergy, claimed jurisdiction over laymen for offences committed by them against the clergy. The Roman Canon which enjoined the separate treatment of layman and clerk was introduced into England in the reign of Stephen, and the first effect of amenability to merely spiritual penalties seems to have been an increase of violent crime on the part of ecclesiastics. Henry II's attempt to enforce the Common Law against criminous clerks led to his quarrel with Becket. The Archbishop claimed that for a first offence, however bad, a person in orders was liable only to degradation, so that on a second offence he could incur the full secular penalty; otherwise he would suffer two penalties for one offence. This clearly licensed clerks to commit at least one murder with impunity, and Henry's answer was the Constitutions of Claren-

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don in 1164. By the third clause the king laid down that 'clerks accused of any matter when summoned by the king's Justiciar shall come into his court, and there answer for what it shall seem good to the king's court that he should answer for there, and in the church court for what it shall seem good that he should answer for there; so that the king's Justiciar shall send into the church court to see how the case is tried there, and if the clerk shall be convict, the Church ought not to defend him further.' In other words, 'Henry did not propose (as the clause is usually interpreted) that a clerk accused of crime should be *tried* in the temporal court, and he did not propose that a *clerk* should be punished by a temporal court. The clerk was to be tried in the bishop's court, and if convicted and degraded there, he would be brought back into the king's court and would be 'sentenced (probably without any further trial) to the layman's punishment, death

¹ Maitland, *Eng. Hist. Rev.* vol. vii. pp. 225-6.

or mutilation!'. But whatever the exact point of the king's contention, in 1176 he was obliged at any rate to modify his demands and to agree that no clerk should be tried by a lay court on a criminal charge or charge of trespass, except trespass of the forest, and questions of lay fees for which lay service was due; while he further allowed that murderers of ecclesiastics should forfeit inheritance as well as life, and that the clergy themselves should be exempt from submitting their claims to ordeal by battle. This concession practically recognized the right of what was called 'benefit of clergy,' which was amplified and extended in nearly every subsequent reign up to the Reformation. The resulting evils were enormous; for not only was the procedure of the ecclesiastical courts of the clumsiest kind, but the immunity from the ordinary criminal law was claimed by a host of persons in 'minor orders' living the ordinary layman's life. It has been shown that the 'king's justices, who never loved it, at length reduced it to an illogical absurdity'; for 'they would not be at pains to require any real proof of a prisoner's sacred character. If he could read a line in a book this would do; indeed, it is even said that the same verse of the Psalms was set before the eyes of every prisoner, so that even the illiterate might escape if he could repeat by heart those saving words.' Thus benefit of clergy 'made the law capricious without making it less cruel'.²

² Maitland, in *Social England*, i. 298.

There were, however, two practical limitations; for, in the *first* place, except in times of political excitement the Church would prefer to save its reputation by disclaiming a clerical criminal; while, *secondly*, even the most pious kings threatened and sometimes executed bishops and lesser churchmen for political offences. Henry IV's championship of the Church against the Lollardy of his predecessor did not prevent him from hanging a number of friars who were spreading sedition, or stop him even from the execution of Archbishop Scrope. But although benefit of clergy formed the subject of many statutes, they were all practically confirmatory of the privilege until the reign of Henry VII. The first legal limitation was contained in a Statute of 1488-9 which enacted that every person accused of murder, rape, robbery or similar crimes, 'which once hath been admitted to the benefit of his clergy (i. e. in minor orders), eftsoones arraigned of any such offence, be not admitted to have the benefit or priviledge of his clergy,' but is to be branded; while a person 'within orders' is to produce proof of his orders on arraignment, or the benefit will be denied to him also. An Act of 1536 seems to be the first which withdrew the privilege from those in higher orders charged with certain grave offences. But it lingered on until comparatively recent times, and even in cases where it was withdrawn from all others who had hitherto claimed it, an Act of Edward VI saved it for 'a Lord or Peer of the Realm though he cannot read.' Readers of 'Esmond' will remember the escape of Lord Mohun by this means from the penalties of his successful duel with Lord Castlewood.

4 Hen. VII.
c. 13.

28 Hen.
VIII. c. 1.

Exemption from lay taxation involved the claim on the part of the Church to tax itself for secular purposes. Now, clerical property consisted of (a) *land* whether held by temporal services or in *frankalmoigne* (free alms). The land held by temporal services had the same liabilities as the landed estates of laymen. The objection raised by Archbishop Theobald in 1156 to the payment of scutage by bishops, was perhaps made on the idea that all ecclesiastical payments to the Crown were of the nature of free gifts; but the preliminary demand which Henry II laid upon bishops as well as barons, to send in an account of the knights' fees for which their estates were liable, practically established the king's opinion in the matter. The

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second kind of clerical property is comprehended under the term (*b*) *spiritualities*, and consisted of tithes and voluntary offerings. The taxation of the moveables of the laity led by a necessary conclusion to a similar treatment of the spiritualities. All the early cases of this mode of levy can be explained away. Thus, the Saladin Tithe (1188) was for an ecclesiastical, not a national purpose; Richard I's ransom was altogether exceptional; and John's demand on the beneficed clergy through the bishops in 1207 was refused. In fact, it was only with the alliance of king and pope under Henry III that the spiritualities came to be placed ordinarily under contribution. Then, by the usual form, the clergy at the pope's request granted a tenth to the king instead of to the pope. The first instance of this grant was in 1226; and after 1252 it became the general method by which the spiritualities of the Church contributed to the needs of the State. The *results* were important. It led, in the *first* place, to the valuation of ecclesiastical property temporal and spiritual; and the assessment made in 1291 at the instance of Pope Nicholas remained in force until the Reformation. A *second* result was the assembly of clergy in distinct bodies for secular business, and the consequent attempt of Edward I to include a representation of the clergy in his Parliament of Estates. But his failure did not prejudice the success of a *third* result; for, owing to the refusal of the bishops on more than one occasion to grant money in the name of the unrepresented clergy, a representative element was introduced into Convocation. Thus it was through Convocation that the popes raised the tenths which they directed the clergy to make over to the king. The cause of the abstention of the clergy as a body from Parliament has been elsewhere dealt with. The king ultimately acquiesced in their absence, but not without a struggle. He *first* tried to tax the clergy otherwise than with the sanction of the pope. But in 1297 Archbishop Winchelsey, in obedience to the bull *Clericis laicos* issued by Boniface VIII, refused to make such a grant to the king. Edward I outlawed the whole of the clergy, and the bishops were recommended by the archbishop to make their submission to the Crown as best they could. Such a crisis could not be of frequent occurrence. Edward II's councillors, *secondly*, tried moral suasion; and from 1311 to

1340 a special paragraph was inserted into the *praemunientes* clause of the writ enjoining the bishop to compel the lesser clergy to send representatives. It has been shown elsewhere that the king acquiesced in the absence of the clergy because they voted him, through Convocation, as large a sum as he could expect to get; for the clerical tenth at the valuation of 1291 reached £20,000. But, like the lay tenth-and-fifteenth, it sank in value until under Henry VII it was estimated at only half its original sum. Under Henry IV the tenth was supplemented by a tax levied by Archbishop Arundel, probably through the bishops, on the stipendiary or chantry priests who were unrepresented in Convocation. It is noteworthy, in conclusion, that, while the Knights of the Shire, as already noticed, attacked the temporal possessions of the bishops and monasteries, they never threatened the spiritualities of the parochial clergy; and, indeed, their only attempt to tax the clergy by a repetition of Archbishop Arundel's method of bringing under contribution the stipendiary priests, was at once quashed by the king. Thus the clergy won and maintained their right of self-taxation: but their negative attitude by which they gained it, prevented them from ever exercising a direct voice in the bestowal of the money they had granted.

Before passing away from the question of the connexion between State and Church, it is important to note the great part necessarily played by ecclesiastics in definitely lay offices. The mediaeval clergy have been divided into three schools or classes: (a) the devotional or spiritual, few in numbers and reaching their ideal in Anselm; (b) the ecclesiastical or professional, such as Henry of Winchester, closely connected with Rome and taking a mediatorial attitude in the State to further the interests of the Church; and (c) the secular or statesman, whose preferment in the Church came as a reward for official services. They formed a very important body, and their existence largely influenced the organization of the State. 'The State,' says Dr. Stubbs, 'gained immensely by being administered by statesmen whose first ideas of order were based on conscience and law rather than on brute force,' for 'they laboured hard to reduce the business of government to something like the order which the great ecclesiastical organization of the West impressed on every branch of its adminis-

¹ *Const. Hist.* § 166. tration¹. The type of this class is found in Bishop Roger of Salisbury and his family, to whom were due the organization of the Exchequer under Henry I, the peaceable acceptance of king Stephen, and his subsequent rejection. Becket as Chancellor, Hubert Walter as Justiciar, and Stephen Langton, who, however, held no secular office, each in his degree largely contributed to the formation and maintenance of a system of strong and orderly government. On the other hand, the evil of the system was seen both in the refusal of the bishops to support Anselm against William II because, as they said, they were too poor and dependent to have a conscience, and in their support of Henry II against Becket because they were servants of the State rather than of the Church. It was only by slow degrees that the opinion of even the most spiritually minded churchmen turned against the absorption of their body in secular employment. Roger of Salisbury himself, while on the one side he held the Justiciarship with the full approval of Anselm and his successors, on the other side refused in the first instance to accept it without the pope's consent. A century later we find, by contrast, Innocent III commanding Archbishop Hubert Walter to resign the same exalted post. The incompatibility of the simultaneous tenure of the highest offices of Church and State was gaining recognition. But it was some time before the custom was abandoned. Indeed, in the fourteenth and fifteenth centuries the number of churchmen in lay offices increased; for, after the land legislation of Edward I had ensured the safety of entailed estates, the nobles tried to compensate their younger sons with ecclesiastical preferment. The leaders of the Church became, in consequence, less and less sympathetic with the lower clergy and increasingly secular in tone and feeling. How weak was the corporate action of the Church is shown by the fact that, in the case of both Edward II and Richard II, only a single bishop was found on the side of the fallen king. Two results followed from the secularization characteristic of the fifteenth century. In the *first* place the majority of bishops, if they were not altogether foreigners, were at any rate non-resident. Their ecclesiastical work was done by titular prelates, such as the Bishop of Jerusalem, and by suffragan bishops, of whom there seems to have been one and some-

times even more, in almost every diocese. Thus Kemp, who was Archbishop of York for twenty-six years (1428-1454), never went near his diocese. As a *second* result the bishops sometimes suffered the extreme fate of unpopular ministers. Thus Archbishop Sudbury was murdered in Wat Tyler's Rebellion (1381); and Bishop de Moleyns of Chichester met a like fate in 1450. This secular employment of the clergy seemed to reach its climax on the eve of the Reformation. Archbishop Warham as Chancellor was succeeded by Wolsey, while Bishop Fox of Winchester was Treasurer, the Bishop of Durham Secretary, and the Bishop of London Master of the Rolls.

§ 86. In order to point the full contrast between the position of the Church in England before and after the Reformation, it is necessary to conclude this description of the constitution of the mediaeval English Church with a short account of its connexion with the papacy. There were five methods by which the pope endeavoured to obtain a hold over ecclesiastical affairs in England. Of these the most important, from the constant pressure which it enabled him to exercise, was his (i) *interference in the appointment of bishops*. The gradual growth of this method may be traced through three stages. It was begun by the gift of the pallium or pall to the Archbishop. This was a kind of woollen collar, a relic of imperial state, which was at first merely an honorary gift, but gradually came to be regarded as so necessary that the archbishop would not consecrate bishops until he had received it. Pope Gregory had in the first instance sent a pall to Augustine, and until the time of Lanfranc the archbishop usually travelled to Rome, often at the sacrifice of his life, to receive it. The claim to refuse the pall placed in the hands of the pope the power of veto on the elections of national churches. A second stage was reached when the pope was able to interfere in the election of prelates as a matter of appeal. His power in this respect was limited at first to a decision as to the merits and the canonical election of one of two disputed candidates. But in 1204, in the case of the archbishopric itself, Innocent III claimed the right to reject the proffered candidates and to appoint his own nominee irrespective of the royal assent. This principle was carried out in the cases of Stephen Lang-

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ton, Edmund Rich, Kilwardby, and Peckham, and in 1262 was extended to bishoprics. Finally, the pope added to the appellate jurisdiction a claim to the patronage of vacant sees. On the death of Archbishop Winchelsea in 1313 he extended to bishoprics the system of provision and reservation, which since 1226 had been applied to benefices and prebends or canonries. Moreover, he claimed the sole right of translating a bishop from one see to another and of filling the vacant see; while he regarded as papal perquisites the sees left vacant by bishops who died at the court of Rome. In all these various ways it came about that, by collusion with the king and even after the grant of freedom of election by John, the elective rights of cathedral chapters between the reigns of Edward I and Henry V were practically extinguished. Nor was the recovery of their power under Henry V more than momentary. Indeed, under his successor papal interference was more constant than at any previous time, and Martin V provided to no less than thirteen sees of the province of Canterbury. The Tudors asserted the rights of the king, and from the first the royal nominees were invariably chosen. The constitutional importance of this method of papal interference will be realized when it is remembered that the representatives of the spiritual estate formed the larger half of the members of the House of Lords.

Appeals.

A second and most important method of papal interference in the affairs of the Church was by (ii) *the encouragement of appeals* to Rome. Under the Anglo-Saxons reference was often made to the pope in ecclesiastical matters for which local custom furnished no rules. In the only cases of appeal against a local decision—those of Wilfrid of Northumbria (678) and the Norman Archbishop Robert (1051), the papal interference was either repudiated by the Witan or simply ignored. The first Norman kings followed the continental custom in allowing appeals to Rome with the royal licence in matters which the local tribunals were incompetent to decide. Under Stephen the divided state of the country caused a great increase in the frequency of appeals. Such appeals fall into *two classes*—(a) *extra-judicial*, or appeals *à gravamine*, to stay the action of a superior court in a case which had not yet been heard by the court. This amounted to an invocation of the

protection of the pope, and of this kind were by far the largest number of recorded appeals to Rome: (b) *judicial* appeals from a definite sentence, which were made by a demand of 'apostoli' or letters dimissary from the court against whose sentence the appeal was made. The *subjects* of appeal were of every kind that could be tried in an ecclesiastical court, especially such as concerned disputed elections to bishoprics, cases of marriage and wills, resistance to the authority of bishops and abbots, and the interpretation of ecclesiastical customs. There were two important *exceptions*—(1) questions concerning the title to real property and touching such matters as advowsons, legitimacy, and dower, were by Henry II's legislation withdrawn once for all from the church courts; (2) there is no appeal on record against sentences for immorality, heresy or any kind of direct disobedience in ecclesiastical matters; for no appeal was allowed from a mere corrective judgment. But these exceptions, important though they were, diminished little from the general sum of the appeals to Rome, the great volume of which encouraged the king from time to time to attempt *measures of restraint*. The *first* of these was contained in the *Constitutions of Clarendon*, by which (§ 8) Henry II provided for appeals up to the Court of the archbishop, then to the king by whose command the matter should be reheard and the decision finally given in the Court of the archbishop; but no further appeal should be allowed without special leave of the king¹. This clause, however, Henry was obliged to¹ *Sel. Ch.* renounce, and with it disappeared the king's right, maintained p. 139. by the Normans, of withholding the licence of appeals to Rome. Henceforth the only restraints which the king could enforce were the withdrawal of questions of real property from ecclesiastical courts altogether; the limitation of appeals to strictly ecclesiastical cases; and the maintenance of the common-law right which forbade a subject to quit the kingdom or to introduce papal letters without royal leave. This would, however, only be enforced in times of popular excitement. A *second* attempt to check the action of the papacy was by implication contained in John's *grant of freedom of election* to cathedral chapters in 1214². But the only result has been described as² *Ibid.* 'freedom of litigation'; and John's previous surrender to the p. 288. papacy³ was directly responsible for the thirty disputed elec-³ *Ibid.* p. 285.

27 Edw.
III, st. 1,
c. 1.
16 Ric. II,
c. 5.

tions which were carried to Rome between 1216 and 1264. Indeed, Henry III himself appealed to the pope for a release from his oath to the barons, and even Edward I dared do no more than discourage appeals by making it easier to get justice at home. The futility of John's grant is proved by frequent petitions, such as those of the Mad Parliament in 1258 and the Parliament of Carlisle in 1307, on the subject of freedom of election. Indeed, all early legislation on the matter was defeated by connivance of the pope and the king. The third and most deliberate attempt to check appeals to Rome was made by the *Statutes of Praemunire* (1353 and 1393) which decreed sentence of forfeiture and banishment against all who carried their cases beyond the king's court. But even this did not entirely stop appeals; for, in the *first* place, it did not touch the case of appeals made with the leave of the Crown, or on subjects with which the local courts were not competent to deal; while, *secondly*, no legislation could preclude the exclusive dealings of the pope and the Crown. At the same time, the Statute is an index of the feelings of the fifteenth century, whose advent was accompanied by a diminution in the number and subjects of appeals to Rome. The former was probably due to the general discredit which the schism and the general councils had brought upon the papacy, the increased strength of the royal courts and, in some measure, the Statutes of Praemunire, for the repeal of which Martin V forced Archbishop Chichele to contend. But the influence of the Statutes was marked by the use to which Gloucester put them in his contest with Cardinal Beaufort, and by the fact that they were Henry VIII's pretext for the overthrow of Cardinal Wolsey. The subjects of appeal were also limited to little beyond matters of marriages and wills; and it was over a case arising out of the former set of questions that the Reformation in England began.

Provisions. Although the papal interference in the appointment of bishops was the most conspicuous mode of the action of Rome on the English Church, it was only the imitation in a higher sphere of (iii) the *system of provisions and reservations* already begun in the case of benefices and canonries, which was a direct attack on the right of private patronage. In 1226 the papal envoy, Otho, began with a demand for the reservation of

two prebendal stalls in each cathedral church, which the pope could bestow upon his own nominees. Both this and an attempt in 1239 to apply the same system to benefices in private patronage, were refused. But, nothing daunted, the pope in the following year (1240) chose the Bishops of Lincoln and Salisbury from whom to make the unprecedented demand of provision for 300 foreign ecclesiastics. This and subsequent demands led to the strong remonstrances of the devout Bishop Grossteste himself and of his followers, together with the presentation of petitions from the national council. A royal ordinance of Edward III in 1343 was followed by the Statutes of Provisors of 1351 and 1390, the latter of which decreed forfeiture and banishment against all who obtained provisions or reservations. But neither protests nor statutes were of much avail. In 1313 the system was extended to bishoprics, and by collusion with the king the appointment to these high offices and the usurpation of private patronage went on unchecked.

25 Edw.
III, st. 4.
13 Ric. II,
st. 2, c. 2.

A fourth means of papal influence was (iv) *the appointment of Legates*. Before the Norman Conquest there are only two recorded instances of the visit of papal legates to England. But the early days of the Norman rule were contemporary with the efforts of Gregory VII to make all episcopal authority into a mere delegation from Rome by employing legates as the ordinary means of communication. These pretensions of the papacy were met in England both directly and indirectly. William I in his *Consuetudines* boldly forbade the entrance of legates without the king's leave¹, while Anselm followed with an assertion that the legatine power over England belonged by prescriptive right to the see of Canterbury. This belief may have led Archbishop William of Corbeil, encouraged by the practical solution of the question of Investitures and incensed by the visit of another legate, to obtain from Rome the legatine authority for himself as Archbishop of Canterbury (1127). But the assertion of Anselm was not really made good until the time of Stephen Langton. Henceforth, until the repudiation by Cranmer in 1534, the Archbishop of Canterbury was *legatus natus*, receiving the ordinary legatine commission as soon as his election was confirmed at Rome. The results were important. In the *first* place, the supreme

¹*Sel. Chart.*
p. 82.

jurisdiction of the pope was thus introduced into the country in a manner which the kings could scarcely refuse to recognize; *secondly*, it made even the ordinary metropolitan jurisdiction appear so much a delegated power from Rome that Alexander III declared this to be the origin of the archbishop's right to exercise jurisdiction in the dioceses of his suffragans. Modern authorities, however, believe that this power was undoubtedly exercised from early times. It is to be noticed, as a *third* result, that the presence of a perpetual representative of the pope did not shut out the visits of *legati a latere* or special emissaries such as Otho and Ottobon in the reign of Henry III.

The last way in which the pope made his power felt in the country was through (v) *the papal exactions*. Of these, three kinds were *levied from the whole nation*. The *first*, and best known, was *Peter's Pence*, or Rome feoh, as the Anglo-Saxons called it. This probably originated in the tribute paid by Offa of Mercia for the papal authorization of his new and short-lived archbishopric of Lichfield (787). From the beginning of the tenth century it became a regular tax of a penny on every hearth. The institution of a similar tax by Ini of Wessex for the maintenance of the English School at Rome seems unsupported by sufficient evidence. The tax became commuted for a sum of £201 9s. from the whole kingdom. It was acknowledged by William I and was paid with fair regularity. In 1306 Clement V tried unsuccessfully to increase it by a return to the levy of a penny on every household. In 1366, when John's tribute was repudiated, Peter's Pence was for a time also withheld. A *second* papal tax was *John's tribute* of a thousand marks from England and Ireland which he promised on his submission to Innocent III in 1213¹. The liability lasted until 1366 when, amid the anti-papal legislation of Edward III's reign, Parliament definitely refused any further payment of the tribute which had been many years in arrears. A *third* and intermittent tax was formed by *contributions for religious purposes*. These were taken by the pope's agents in the form of voluntary gifts, the best known of which was the Saladin Tithe for the Crusade of 1190². The official collector of the pope was perhaps the best-hated man in the country. He was petitioned against in 1376, voted

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¹ *Sel. Chart.*
p. 285.

² *Ibid.*

p. 160.

a public enemy in 1390, and imprisoned in 1427. The only restraint upon him was a stringent oath of fealty to the Crown which was exacted from him. But there were two other kinds of exactions which were *levied from the clergy alone*. They paid, *firstly, tenths of ecclesiastical revenue*. These were taken through Convocation, but were practically compulsory. They were frequently levied under Henry III, and Edward I and II allowed the exaction because the pope gave them a share in it. But the king made use of the exiled and divided state of the papacy in the fourteenth century to continue to take the tenth, while the papal demands were often refused (1389) or postponed (1427, 1446). *Secondly*, the clergy were called upon to pay *Annates* or firstfruits, which amounted to the whole of the first year's income of a newly appointed bishop or incumbent. Beginning as a voluntary offering, with the acknowledgment of the papal right of provision it became compulsory. The first pope who claimed it in England was Alexander IV, in 1256, but it did not become perpetual until John XXII. It reached a considerable sum, and Convocation in 1531 stated that from 1486 £160,000 had been paid under this head. In conclusion, it should be noted that, besides these payments, there were others, such as fees for Expectatives, or the right of succession to a benefice at the next vacancy, for dispensations of all kinds, and for a general traffic in spiritual things.

§ 87. With the causes of the Reformation we are here not immediately concerned, although indirect illustrations of the corrupt and ignorant state of the clergy have been abundantly supplied. The results of the Reformation on the structure and position of the Church may be dealt with under the already familiar heads of (1) the Church as a Corporation, and (2) the Church in connexion with the State. To these it will be necessary to add, as an ultimate effect of the Reformation, (3) the growth of Religious Toleration.

Even before the break with Rome an increase in the number of *bishops* had been contemplated. Thus, in 1532 Henry VIII obtained from the pope a bull for the erection of six bishoprics. This bore fruit in 1540 when, after the destruction of the monasteries, some of the proceeds were applied to the foundation of six bishoprics with their chapters. These six new sees

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were Westminster (extinguished in 1550), Oxford, Chester, Gloucester, Bristol, and Peterborough. Thus, at Henry VIII's death, the English episcopate was composed of twenty-six archbishops and bishops. Henry had at one time contemplated the creation of as many as eighteen. Not only was there an Act passed (1540), which was repealed in the first year of Philip and Mary (c. 8, § 4), allowing the king to create new sees by letters patent out of the possessions of the monasteries, but as early as 1534 Henry had obtained from Parliament an Act for the erection of twenty-six suffragan bishoprics mentioned by name, which has never been repealed. No new bishoprics were created until 1836, when Ripon was turned from a collegiate church into a cathedral; but this made no increase in the number of the episcopal bench, for Gloucester and Bristol were at the same time united. In 1844 Manchester was made a separate see by Act of Parliament: in 1877 Truro and St. Albans; and in 1878 Liverpool, Newcastle, Wakefield, and Southwell were added to the existing number by a similar method. These, together with the bishopric of Sodor and Man, makes up the present number of the episcopal bench to thirty-four. A limited use has also been made of the Act of Henry VIII to appoint suffragan bishops in some of the larger dioceses; but the chief development of the English episcopacy is to be found in the colonies, in Scotland, and in the United States of America. Two hundred bishops drawn from English-speaking races may be reckoned, a number none too large for the vast populations to which they minister.

The lower clergy.

The effects of the Reformation on the *lower clergy* were of the utmost importance, for the regulars were abolished altogether and the seculars were released by degrees from their vow of celibacy. To deal with the last point first:—Under Henry VIII those who had taken advantage of the laxity which followed the breach with Rome, obtained little help. In 1535 a royal proclamation forbade those clergy who had taken wives, to perform any sacraments or to hold any office within the Church; and the Act of Six Articles in 1539 definitely forbade priests to marry. Under Edward VI came an immediate, though only temporary, relaxation. In 1547 the first Convocation of the reign affirmed, without a single dis-

31 Hen.
VIII, c. 9.

26 Hen.
VIII, c. 14.

31 Hen.
VIII, c. 14.

sentient, the right of priests to marry; and in 1548, after one miscarriage, the Statute 2 & 3 Edw. VI, c. 21, while declaring it better that clerks should remain single, yet legalized their marriage. This was followed in 1552 by a more ungrudging acknowledgment of the right. But on Mary's accession all this was swept away, and by her Injunctions in 1554 married priests were to be removed from their benefices and compulsorily divorced. As a result, 1,500 clergy according to one computation, and 3,000 according to a less favourable authority, were thus deprived. Elizabeth was, much against her will, obliged to yield somewhat to the Protestant views. But she put every difficulty in the way. Thus her Injunctions of 1559 allowed no clergyman to marry without the approval of the bishop, two justices of the peace near the woman's residence, and the parents or employers of the intended bride. Again, in 1561, by a royal proclamation, she forbade any member of a college or cathedral church to marry, and was with some difficulty persuaded by Cecil from extending the prohibition to all ordained persons.

Two classes of ecclesiastics already noticed were entirely abolished as a consequence of the Reformation—the chantry priests and the monastic clergy. The work of the chantry priests had been to say masses for the souls of benefactors. But in 1535 one of the Ten Articles, while allowing prayers, described masses for the dead as superstition and folly. The Act of Six Articles (1539) re-established masses for the dead and, consequently, the belief in purgatory. But the king's doctrinal preferences were no proof against his greed, and in 1545 an Act for the dissolution of all chantries, hospitals, and free chapels was delayed in execution by the king's death. An Act of the first year of Edward VI, however, gave over to the new king the chantries and other sacred buildings which had been already doomed. It is only fair to add that the money thus obtained was not entirely diverted to secular purposes; for not only were twenty-two grammar schools founded, but institutions for the relief of the poor were largely endowed, such as Christ's Hospital for orphans, St. Thomas' and St. Bartholomew's for the sick, and Bridewell for the ruined.

Henry VIII, in his abolition of all the houses of regular

5 & 6 Edw.
VI, c. 12.

37 Hen.
VIII, c. 4.

1 Edw. VI,
c. 14.

Suppression of the monasteries.

clergy, was not acting altogether without precedent. At the outbreak of Henry V's war with France a number of houses affiliated to foreign orders were taken into the king's hands as alien priories. Archbishop Warham, Cranmer's predecessor, had taken an unprecedented course in holding a visitation of the monasteries in his province. Wolsey had gone further; for he had obtained a papal bull for the suppression of forty small monasteries, from the revenues of which he founded his Cardinal College (1528). Henry VIII, too, had supplied himself with a precedent by the suppression of the order of Observant Friars as opponents of his divorce (1534). The first step towards a general blow was the nomination, in 1535 under the Act of Supremacy, of Thomas Cromwell as the king's vicar-general, with complete power to appoint his own agents and for the time to supersede the jurisdiction of the bishops. The *suppression* itself was carried out by two successive Acts—(a) 27 Henry VIII, c. 28 (1536), which suppressed all those houses with incomes under £200 a year. These numbered 376 out of 600 houses in all, and their joint incomes reached £32,000. (b) The Act 31 Henry VIII, c. 13 (1540), both confirmed to the king the abbey which had been surrendered by their owners who had taken part in the Pilgrimage of Grace, and also provided for the surrender of all the monasteries which yet remained. The *results* of this wholesale destruction were numerous and important. In the *first* place, constitutionally the balance between spiritual and temporal peers in the House of Lords was altered. In the Reformation Parliament which met in 1529 the Lords comprised forty-four lay peers, twenty bishops, and twenty-eight abbots and priors. These last entirely disappeared—a fate which they thoroughly deserved, for they offered no opposition to the dissolution of the smaller monasteries and were themselves destroyed individually. A *second* result was the transference of an enormous amount of property. The monks were calculated to have possessed one-fifth of the wealth of the kingdom. The annual income of their lands was reckoned at £140,000, and the value of their moveables at £400,000. Some of the money was no doubt reserved for religious purposes. Six bishoprics were founded; some of the monasteries became collegiate churches, such as Ripon and

Beverley ; many of the abbey churches were left for the parishes. But enough remained in the king's hands to have saved him from the necessity of recourse to Parliament. Fortunately he found himself compelled to buy the acquiescence of the country in the religious changes which had arisen out of his quarrel with Rome ; and his lavish grants of monastic property, carrying with them not only lands but the right to tithe, raised up a new class of country gentlemen who took an active part in the literary, religious, and political movements of the time ; as justices of the peace monopolized the local administration ; and as members of Parliament began before long to vindicate its power and privileges against the Crown itself. Other results do not concern us here.

§ 88. The government of the corporate Church may still be dealt with under the twofold head of councils and courts. Convoca-
tion. Among the former, Convocation alone calls for detailed treatment as involving important constitutional questions. The most important matter in this connexion concerns the extent to which Convocation was consulted in the ecclesiastical changes. Two preliminary points must be borne in mind. The *first* concerns the authority which the sovereigns conceived to have been conferred on them by the title of Supreme Head. Now, none of the three sovereigns who effected the settlement of the Church, had the least intention of subjecting their ecclesiastical authority to the supervision or arbitration of Parliament. Henry VIII used the aid of Parliament to fight a hostile Convocation ; but he intended to maintain the old ecclesiastical system as a framework for the exercise of his new ecclesiastical despotism. Edward VI and his ministers were bent on destroying the old framework of Church organization by means of the same despotism ; and yet even they submitted many important measures to Convocation. Elizabeth, following in her father's footsteps, was first careful to secure a Convocation which would accept the Prayer Book ; but when this was accomplished she would not allow Parliament to interfere with her ecclesiastical prerogative ; while at the same time Convocation under her licence passed Canons to which, however, she allowed or refused authority at pleasure. A *second* point to be remembered is, that where the record of Convocation is lost, or when the journals of Convocation note

that silence was imposed on its members, the presumption is not necessarily against the co-operation of Convocation in matters which had hitherto been submitted to it and were then being transacted in Parliament.

Its action
in the
Reforma-
tion.

26 Hen.
VIII, c. 1.

25 Hen.
VIII, c. 19.

These two points will help to an appreciation of the following facts. *Under Henry VIII* the consent of the Church was necessary to two separate kinds of changes—those in the constitutional position and organization, and those in doctrine and ritual. As to the first point, the Act of Supremacy was based on the recognition of the royal supremacy by Convocation in 1531, and restored the words limiting that supremacy which had been omitted both in a form of submission required from individual clergy in 1534 and in the Act of Appeals in 1533. The subsequent Acts extending that supremacy, of which mention will presently be made, do not seem to have been submitted to Convocation. The second great Act affecting the constitutional position of the Church was the Act for the submission of the Clergy (1534). Of this, part was in the Submission of the Clergy made by Convocation in 1532; and it seems probable that the more important part of the Act, which regulated appeals, was also laid before Convocation. There is, however, no direct proof of this. In the settlement of doctrine and ritual, the Ten Articles of 1535 were accepted by Convocation alone; the Six Articles of 1539, reaffirming some of the prominent Catholic doctrines, had the approval of both Convocation and Parliament. Most of the changes made in these particulars seem to have been authorized by the king alone, though some were submitted to Convocation. Thus, in 1537 the king licensed Matthew's Bible; in 1539 he authorized the possession of Bibles in private houses; in 1546 he forbade the use of Tyndale's and Coverdale's translations. On the other hand, in 1543 Convocation ordered the curate in every parish to read the Bible to the people on holydays; and while the English Litany was authorized by the king, the Lord's Prayer and other English portions of the breviary were submitted to Convocation. Again, the 'Institution of a Christian Man' (1537) was authorized by the king, though the 'Necessary Erudition' (1542) was laid before Convocation. There are, moreover, numerous indications that even when the fully prepared measure was not

forthcoming, Convocation was used as a consultative body both in matters authorized by the king and in those legalized by statute. Under *Edward VI*, while, on the one hand, the assent of Convocation was given to the first Prayer Book ; to the administration of communion in both kinds to the laity ; and to the right of clerical marriage before these were actually legalized ; yet, on the other hand, there is no record that Convocation was consulted with regard to the Ordinal for the consecration of bishops which was published separately in 1550 ; to the second Prayer Book of 1552 ; to *Cranmer's Catechism* and the Forty-two Articles of 1553 ; and to the *Reformatio Legum* or Reform of Ecclesiastical Laws. All these were the work of small committees who held such a vague relation to Convocation as might arise from the fact that many of them were appointed in accordance with its petition. The hostility displayed by Convocation at the beginning of *Elizabeth's* reign caused her to use the sanction of Parliament alone for the restoration of the service-book of Edward VI. But when she had once procured a favourable Convocation, she allowed no interference with its action save such as she conceived to be in accordance with the exercise of the royal supremacy.

The whole position of Convocation towards the king was changed by the Reformation. This was the result of the Submission of the Clergy of 1532, followed by the Act for the submission in 1534. By these, Convocation was made to acknowledge (*a*) that no legislation by the clergy was valid without the king's assent and permission for its execution, and that Convocation could only be assembled by the king's command ; (*b*) that a reform of the ecclesiastical laws should be undertaken by a royal commission of laity and clergy, and that meanwhile with the king's approval the ancient laws of the Church should stand good ; (*c*) by the Act of 1534 provision was made for ecclesiastical appeals to be taken to the king in Chancery. The difference in the attitude of the king with regard to Convocation before and after the Reformation may be described as the substitution of a positive for a negative attitude. Thus, whereas up to 1532 the king contented himself with prohibiting the ecclesiastical assemblies from enacting anything contrary to the law of the land, while Convocation

Its position
towards the
Crown.

met at the archbishop's summons and not at all necessarily, though for convenience sake, at the same time as Parliament; *now* Convocation meets only at the sovereign's will; it can do nothing at all without his assent; its legislation is subject to the revision of a royal commission; and appeals against its laws are made to a royal secular court. It was probably this curtailment of its authority even over the clergy which from 1546 established a necessity that the clerical tenths granted to the Crown should receive confirmation in Parliament, and thus should be raised if needful by coercion through the secular power. But it was not till after the Restoration that a verbal agreement between the Chancellor and the Archbishop surrendered the clerical right of self-taxation (1664). The result of this surrender was important if not serious. The bulk of the clergy were Tories and even Jacobites: the bishops of William III and of George I were Whigs. The quarrels between the two houses of Convocation caused its abeyance for ten years under William III; and the action of the lower house of Convocation in what is known as the Bangorian controversy, provoked by a sermon of the Whig bishop, Hoadley, determined the Government of George I to suppress the whole body. From 1717 until 1840 the Church as a corporation had no constitutional means of expressing its united opinion. Meanwhile, the number of subjects on which Convocation could legislate has been much curtailed: its decrees are not binding on the laity unless accepted by Parliament: it cannot even conduct a trial for heresy, although the condemnation of heretical books is still within its province. Convocation has instituted inquiries and discussions, and has made reports through committees; and a few of its recommendations, chiefly touching matters of services and ritual, have been embodied in Acts of Parliament.

Ecclesiastical Courts after the Reformation.

24 Hen. VIII, c. 12.

§ 89. The old ecclesiastical courts of archbishop, bishop, archdeacon, and such peculiars as had survived the dissolution of the monasteries, continued to exist after the Reformation, and were held under the authority of the archbishops, bishops, and other ordinaries. The changes made by the Reformation may be conveniently classed under the five heads of Appeals, Judges, Law, Jurisdiction, and Authority. As to *Appeals*, the Act in Restraint of Appeals arranged for appeals from the

archdeacon's court to that of the bishop; from that of the bishop to that of the archbishop; and further, but only when the king was concerned, to the upper house of Convocation. This was modified by the Act for the submission of the Clergy^{25 Hen. VIII, c. 19.} which decided that appeals should go from the archbishop's court to the king in Chancery. This was the foundation of the Court of Delegates of Appeals which formed the supreme tribunal of appeal in ecclesiastical causes from 1559 to 1832. Its functions were transferred, by two statutes of William IV's^{2 & 3 Will. IV, c. 92;} reign, to the Judicial Committee of the Privy Council. As to *Judges*, a statute of 1545 allowed Doctors of Civil Law, though laymen and married, to act in this capacity. This was still^{3 & 4 Will. IV, c. 41.} more loosely interpreted, and even the qualification of Doctor^{37 Hen. VIII, c. 17.} was regarded as unnecessary. Attempts were made to alter it, and a Canon of 1604 while leaving to the ecclesiastical judge, however qualified, the power of suspension and excommunication, yet reserved to the bishop the sentence of deprivation or deposition. The question of the *Law* administered by the courts is rather more complicated. The Act for the submission of the Clergy gave to the king the power of appointing a committee of sixteen clergy and as many laymen to revise the existing canons and constitutions. By subsequent statutes this power was given to the king for life. It was renewed to his successor by an Act of 1549-50, under which three^{3 & 4 Edw. VI, c. 11.} commissions were issued. Meanwhile, in the last year of Edward's reign, Archbishop Cranmer and the foreign reformer, Peter Martyr, completed a *Reformatio Legum* which, however, was never authorized, though it was subsequently published (1571). The power was again renewed to Elizabeth on her accession; but after some ineffectual attempts in her first Parliament nothing more was heard of the matter. The laws, then, which in the absence of this revision the ecclesiastical courts had to fall back upon, consisted of (1) the Canon Law of the Church so far as it did not run counter to the Common Law or the royal prerogative: (2) the king's ecclesiastical laws such as those relating to the Prayer Book and the Articles made by virtue of the royal supremacy: (3) the Canons of Convocation licensed by the king. Of these there were three sets—those of 1597 and 1604, which, since they have never received parliamentary sanction, are not regarded as binding

on the laity; and those of 1640, which, owing to the circumstances under which they were drawn up, are not regarded as having authority at all: (4) royal proclamations issued by virtue of the Acts of Supremacy and Uniformity. The *Jurisdiction* of the ecclesiastical courts was of course much diminished. In the first place, the Statute Law quite overrode the Canon Law. The authority of the pope had been annulled by statute which thus very materially limited the matter of the Canon Law. Prohibitions from the secular courts to stay trial or sentence in the church courts were no new thing, but now the judges issued them with greater freedom, while even in the ecclesiastical courts themselves Common and Canon Law were of equal authority, and, in case of a conflict, the Canon Law had to give way. Nor was this all; for, in the second place, the Courts of Common Law obtained concurrent jurisdiction with the ecclesiastical courts. It is scarcely to be wondered at that the church courts decayed. Nor did the fact that the bishops preferred to gain their ends by a use of the powerful *Court of High Commission* help to strengthen them.

Both Edward VI and Mary at the beginning of her reign had considered themselves justified by Henry VIII's Act of Supremacy in issuing special commissions for inquiry into heresies. Those of Edward VI, issued in 1549 and 1551, were empowered to exercise full jurisdiction; that of Mary in 1557 was limited to inquiry. Acting upon these precedents, and, moreover, definitely authorized by her Act of Supremacy (1 Eliz. c. 1), Elizabeth in 1559 issued an extensive commission to nineteen persons for the execution of the Acts of Supremacy and Uniformity. The inquiry was to be conducted 'as well by the oaths of twelve good and lawful men as also by witnesses and other ways and means ye can devise,' and the commissioners were empowered to hear and determine all cases which could be included under a wide interpretation of the application of the two Acts. Thus not only the punishment of heresy and absence from church is committed to them, but they are even empowered 'to visit, reform, redress, order, correct and amend all offences which, by any spiritual or ecclesiastical power, authority or jurisdiction, can be so dealt with.' Finally, the commissioners are given the assist-

ance of 'all justices of the peace, officers and faithful subjects.' This commission formed a precedent for all those which were subsequently issued, the chief differences being that the execution of other Acts besides the two already mentioned were added to the work of the commissioners; that the powers entrusted to the latter were definitely stated or extended; that the number of commissioners was increased; and that often a commission was issued to take effect only in one of the two provinces or even in a single diocese. The connexion of this court with, and its effect upon, the purely ecclesiastical courts was of immense importance. For it was, for those who came to it, a court of first instance and itself not subject to appeal, except¹ for a short period under James I, whose commission of 1620 provided for the appointment by the king's favour of commissions to review its decisions. At the same time, it neither superseded the ecclesiastical courts of the ordinaries, nor was it, like the Court of Delegates, a court of appeal from them. Yet a very brief account of its jurisdiction will suffice to prove the blighting effect of its existence on the ordinary Church courts. 'Every offence that could be treated as ecclesiastical was inquired into; every offender, accused or suspected, tried and punished or acquitted; every device for obtaining information was used; every claim for the assistance of secular justice was made and as far as possible enforced; every method of instituting a suit was allowed¹.' The Common Law Courts, by the grant of writs of Habeas Corpus and by Prohibitions, in vain tried to restrict the action of this powerful commission. It is not difficult to understand that so long as this court existed, no important case touching doctrine or ritual could well find its way into the Court of Delegates, whose work was consequently somewhat restricted in range; while, since all important offenders were brought straight before the commissioners, the work of the ordinary courts was confined to such unimportant cases as would not need or be allowed an appeal. It is, however, difficult to understand how the more single-minded bishops of the time permitted themselves to make use of such commissions. It may be, as has been conjectured, that they 'saw in some such engine the only safeguard against anarchy.' But in whatever way they justified it to themselves, it seems certainly true that 'the result of the

¹ *Eccles. Courts, Commis.*
i. xl.

working of the court was morally bad and politically destructive.' It is no wonder, then, that the Long Parliament abolished the High Commission, and that James II's attempt to revive it in 1686 was met by its condemnation in the Bill of Rights as 'illegal and pernicious.'

16 Car. I,
c. 11.

From the abolition of the High Commission, which was confirmed at the Restoration, down to 1832, no important change was made in the ecclesiastical courts. The courts were still the old courts of the archbishop, bishop, archdeacon, and such peculiars as had survived the dissolution of the monasteries. The jurisdiction still ranged over an extensive class of cases, including such temporal matters as wills and marriages; matters partly temporal, partly spiritual, such as suits for tithes, Church rates, seats and faculties; and spiritual offences, such as immoral conduct of the clergy, and brawling and defamation of the laity. Both the jurisdiction and courts have been reduced. As to the former, some offences, such as brawling and defamation, have been abolished; some, such as Church rates and tithes, have been compromised; some, such as testamentary and matrimonial causes, have been handed over to specially constituted courts. As to the courts, the peculiars have practically been extinguished; the court of the archdeacon is rarely used; the powers of the bishop have been regulated and indirectly curtailed in favour of the courts of the province by the Church Discipline Act of 1840, amended by the recent Clergy Discipline Act (1892), which provides for the trial of offences against ecclesiastical law, and by the Public Worship Regulation Act of 1874, which deals with the trial of offences against the ceremonial law. Finally, on the formation of the Probate and Divorce Courts in 1857, in both provinces the Prerogative Court of the archbishop lost its jurisdiction over matrimonial and testamentary matters: the Court of Peculiars disappeared with the abolition of the exempt position of the thirteen parishes to which it applied: the Court of Audience, or sphere of the archbishop's personal jurisdiction, has practically fallen into disuse, though it has been thought, despite the archbishop's declaration to the contrary, to have been revived for the hearing of the recent case of *Read v. the Bishop of Lincoln*; and there remains the Court of Arches alone, presided over originally by the official

principal of the archbishop, whose office is now merged in that of the Dean of Arches. But even this official has by recent legislation become little more than a nominee of the Crown ; for the Public Worship Act of 1874 provided not only that the appointee of the two archbishops as judge to carry out the Act, should be confirmed by the Crown, but that in each province he should succeed as of right to the place of official principal as it became vacant. A final curtailment of the authority of the ecclesiastical courts has been provided in the transference of the jurisdiction of the Delegates of Appeals to the Judicial Committee of the Privy Council.

§ 90. All that has hitherto been said concerning the effect of the Reformation upon the corporate body of the Church, forms a fitting preliminary to the consideration of the changes wrought by that movement in the connexion between Church and State. This may be summed up in an analysis of the interpretation put upon royal supremacy. The power claimed by Henry VIII, under the title of Head of the Church, was fourfold. It included, in the *first* place, the king's ecclesiastical prerogative, which, as we have seen, had always been maintained by English law, and, *secondly*, the papal usurpations from the Crown by provisions, appeals, and annates. These were recovered by two statutes. The Act in Restraint of Payment of Annates was passed provisionally, then confirmed by the king in letters patent on July 9, 1533, and, finally, confirmed and supplemented by parliamentary statute. The Act of Supremacy (26 Henry VIII. c. 1) or the style of supreme head, defined the king's position as that of 'the only supreme head on earth of the Church of England.' It gave to the headship two sets of functions, one which has been described as indeterminate, consisting of such powers as were supposed to be inherent in the title of head, namely, the enjoyment of the honours, dignities, privileges, &c., to the said dignity belonging : another determinate set of functions, such as were authorized by the statute, namely, the authority to visit and reform all ecclesiastical mischiefs. But to these two powers were now added other two which were included under the head of the royal supremacy. Thus, *thirdly*, the king claimed the power usurped by the papacy from the Church of England. This was recovered and added to the Crown by three statutes. The

Relations
of Church
and State
after the
Reforma-
tion.

23 Hen.
VIII. c. 20.
25 Hen.
VIII. c. 20.

- Acts in Restraint of Payment of Annates provided for the appointment and consecration of bishops within the kingdom.
- 23 Hen. VIII. c. 9. The Act of Citations, with a view to limiting the power which the archbishop had exercised in virtue of his legateship, forbade any one to be cited out of his or her diocese. Finally, the Act in Restraint of Appeals which was amended by the Act for the Submission of the Clergy, provided for appeals in ecclesiastical cases up to the king in chancery. A *fourth* set of powers included in the royal supremacy was made up of claims which the king had never hitherto put forward. Thus the Act of Supremacy had given the king authority, through a vicar-general, to reform all ecclesiastical mischiefs. The Act of Six Articles allowed commissions to be given to the archbishops, bishops, and others to hold quarterly sessions for the trial of those who called in question the definitions arrived at by the king with Parliament and Convocation; and even justices of the peace were to make a similar inquiry by the help of a jury. The Act concerning Christ's religion stated that the king had appointed archbishops, bishops, and doctors of divinity to declare the articles of the Christian faith, and enacted that all definitions according to God's word and the Gospel, by the king's advice and letters patent, made by the archbishops, &c., should have the force of law. Finally, the Act that married D.C.L.s should exercise ecclesiastical jurisdiction, stickled not to declare that the king could exercise all other manner of ecclesiastical jurisdiction; that archbishops, bishops, and archdeacons have no manner of ecclesiastical jurisdiction but by, under, and from the king; and that to him by Holy Scripture all authority and power is given to hear and determine all causes ecclesiastical, and to correct vice and sin whatsoever, and to all such persons as the king shall appoint thereto. In fact, these acts claimed for the king authority to declare articles of faith: but further, the last two acts state this position in the preamble as if merely calling attention to what was already known and acknowledged. The error which underlay the whole point of view was the idea that the exercise of jurisdiction implied the right of personal direction. As the king, although in theory present in all the courts, has no right to take the place of a secular judge and administer justice, so in ecclesiastical matters he has no right to supersede an officer or to issue orders at his
- 32 Hen. VIII. c. 26.
- 37 Hen. VIII. c. 17.

own pleasure. Under Edward VI the action of the new power acquired by the king as head of the Church was pushed even further than it had been under Henry VIII, both Orders of Council and Acts of Parliament being used for the purpose. Three illustrations will suffice. (1) With regard to the appointment of bishops, the first Act in Restraint of Payment of Annates, passed before the final breach with Rome, provided that, in the case of every one who was presented to the court of Rome by the king to be bishop of any diocese within the realm, if the pope delayed or restrained or denied his appointment by bulls or in any other way, the king's nominee should be consecrated by the archbishop. It was natural that this menace should in the second Act (1534) be superseded by the definite provision that the election to bishoprics should be made by the deans and chapters of cathedrals under the king's licence and letters missive naming the person to be chosen; and that in default of such election, the king should present by his letters patent. By one of the earliest Acts of Edward VI's reign (1 Edward VI. c. 2) this last method was made the rule, and it was provided that bishops should in every case be appointed by letters patent without either the king's *congé d'élire* or letters missive. (2) With regard to the jurisdiction of ecclesiastical officers, at the beginning of Edward VI's reign Cranmer and, possibly, other bishops renewed their commissions for the exercise of their ordinary jurisdiction, as if its efficacy were dependent on each individual sovereign. In the same spirit another Statute of the same year provided that all processes in the ecclesiastical courts should run in the king's name, since their jurisdiction was derived from him and no courts were held by any authority other than that of the king. During the same reign two general royal visitations were carried out—the first in 1547, to press on the reformed doctrines; the other in 1549, to enforce the use of the English Prayer Book: and during each of these visitations the powers of the bishops were suspended. (3) Doctrinal changes were carried out by the same means. In 1547 a book of Homilies, and in 1548 a new Communion Office, were published and enforced by authority of the king alone. So powerful had the title and authority included in the royal supremacy become, that even Mary, with all her desire for the

1 Edw. VI.
c. 2.

restoration of the papal power, did not scruple to use it at the very beginning of her reign for the twofold purpose of repealing the Acts of Edward VI's reign and thus restoring the Church to the position in which it was left on the death of Henry VIII; and of issuing Injunctions after the manner of Cromwell and Cranmer, for the deprivation of the married clergy and other administrative acts. The first statute of Elizabeth's reign was the Act of Supremacy (1 Eliz. c. 1), which, though reviving ten statutes of Henry VIII's reign, did not include among them Henry's Act of Supremacy. It consequently abolished the claim to the title of Supreme Head which Elizabeth's advisers represented to her as unscriptural. The title was changed to Supreme Governor; and as Elizabeth had no intention of parting with the exercise of the ecclesiastical supremacy, all ancient jurisdiction over courts and persons was restored. It has already been noticed that the Act of Supremacy also empowered the Queen to appoint a commission with extensive powers, which armed the Crown with irresponsible authority and was the germ of the High Commission Court. It was by virtue of this same supremacy that another set of Injunctions was published, enforceable by this commission. And yet at the same time, while the power of the Crown was thus extended and strengthened, the method of procedure was altogether more moderate. Thus (i) the Act of Supremacy restored the mode of election of bishops by chapters and in accordance with the *congé d'élire* of the Crown: moreover (ii) to Convocation was given the duty of reducing the forty-two Articles to thirty-nine, and of authorizing a second book of Homilies; though it will be remembered that Elizabeth used her power to annul, as well as to authorize, canons of Convocation: (iii) Parliament was at the same time carefully restrained from meddling in ecclesiastical laws. Elizabeth and the early Stuarts stoutly maintained the inviolable nature of the royal supremacy. Parliament might have a share in taxation and legislation, but the Church was parallel to and not a department of the State, and, consequently, the dealings of the Crown with the Church were not matters for Parliament to discuss. This attitude could only be maintained so long as the nationality of the Church was insisted on and formed a link between Parliament and the

Crown. But after the Restoration, when Charles II used his royal supremacy to publish his Declarations of Indulgence (1663, 1672), Parliament in each case compelled him to withdraw them. The attempts of James II to use the royal supremacy, as Mary before him, to pave the way for reconciliation with Rome, only hastened on the transference of authority in this respect also from the Crown to Parliament. Outwardly, the Crown still possesses the old powers of Head of the Church. Convocation is summoned and dismissed by the king, and legislates only with the royal assent; appeal from the ecclesiastical courts has lain, before 1832 to the Crown in Chancery, since that date to the Crown in Council. But the establishment of the Church means more than this. Nonconformity has been recognized at first by toleration, then by permission to actively participate in the duties of citizenship. But potentially every Englishman is a member of the National Church; and thus, although there is no guarantee that a single member of the House of Commons should be an actual member of the Church of England, yet Parliament has the right, which has not of late years been suffered to lie dormant, of interfering by legislation in its internal concerns to an extent perhaps difficult to realize; while the law courts have the duty of considering cases in which, through disputes over property or contracts, the doctrines of the Church themselves may be subject to legal and secular interpretation. The advantages of a religious establishment may be open to debate; but those who desire all the advantage without any of the necessary compromises, should feel that they must make their choice between a greater and a lesser evil.

§ 91. Now, a chief cause of the Reformation movement had been the growth of the sentiment of nationality in Western Europe as against the universal claims of the papacy. In England old feelings of independence and hatred of foreign interference had been revived, and found expression in the idea of the Commonwealth which is a familiar thought of Elizabethan writers. For the proper protection of that Commonwealth it was necessary that the ruler should have cognizance of both the religious and secular sides of the nation's life; for, whatever else it might be, its religion was a powerful bond of union in the State. Thus, without pretending in

Growth of
religious
toleration.

Attitude of
the admin-
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theory to dictate or in any way to notice religious beliefs, except in so far as such beliefs tended to the undoing of the Commonwealth, the sovereign considered it imperative that he should demand from his subjects an outward uniformity of religious practice which should at least afford a guarantee that they were not disaffected citizens. But the very feeling which led the Crown to disown any intention of inquisitorial judgment over belief, betrayed a consciousness that such belief was a matter for each individual to settle with himself. This was in reality to concede the whole Protestant position; for faith and practice cannot long be kept apart. Heresy had so often come to nothing, because the Roman Church, while sparing the heretic, had exterminated his opinions. But the Tudor sovereigns practically made room for the heresy, though they punished the individual. It is little wonder then that the country swarmed with men to whom the judicious but cold compromise of the Elizabethan church was distasteful. On the one side stood the *adherents of Roman doctrine and*

(a) Roman
Catholics;

discipline in its entirety, regarding England as a lost inheritance, and obliged to rely upon foreign aid. Treated at first as politically dangerous through their obedience to an alien authority, as the struggle with Parliament proceeded, they began to be courted by the early Stuarts as upholders of the divine right of kings; while, as the Nonconformists in the Church became more pronouncedly Calvinistic, their assertion of the Catholic position of the English Church made the Caroline divines disposed to claim a close kinship with Rome. and to seem to be doing everything to bring about an union. Neither James I nor Charles I would ever have betrayed the Church: Charles' sons, on the contrary, did everything to undermine her power, and Romanism once more became the badge of a political party. It was only after all possible danger to the succession to the throne had been for some years removed, that those who had retained the old faith amidst many difficulties and dangers, began once more to be treated as fellow-citizens. On the other side were ranged the

(b) Protest-
ant Non-
conform-
ists.

Protestants in the widest sense, whether Nonconformists or Puritans proper, who were willing to remain members of the Church provided certain changes in outward ceremonial were made; or Presbyterians opposing to episcopacy the divine

government of a board of presbyters ; or Independents, as yet called Brownists or Barrowists, who claimed for each congregation the right of self-control. The school of Andrewes and Laud showed the incompatibility between the Calvinistic theology of the Puritans and the Catholic doctrines which they claimed for the Church ; the republicanism of the Presbyterians never really obtained a hold in England ; the democratic system of the Independents caused the Church to identify herself more than ever with the monarchy. At the same time Parliament was in the hands of the Puritans ; repressive legislation in this direction was simply impossible ; but the Crown found, in the disciplinary authority vested in the royal supremacy, a far readier means of coercing those who professed to remain members of the national Church, but desired to effect certain alterations which should remove it to a safer distance from what they conceived to be the erroneous Roman model. But the triumph over the monarchy worked for the benefit of the extreme section of their party, who might, by way of illustration though not of analogy, be described as the religious Jacobins ; the discredited Puritans hung their heads before the fervent loyalty and vindictive churchmanship of the Parliament of the Restoration. Schemes of comprehension were vain, and the Puritans themselves rejected an indulgence of their worship which was to be enjoyed in company with the Romanists. At the same time, the attitude of the Church had turned them from Nonconformists—that is, persons unwilling to conform to certain outward ceremonials—to Dissenters, or persons who differed altogether from the doctrines of the Church and stood outside her pale, repudiating and repudiated. But although the Church showed herself more than willing to continue her services to the Crown, it was the Crown itself which cast her off and sought to betray her. The Church became a powerful emblem of nationality ; and while her existence in nominal supremacy seemed to guarantee the country against outside interference from Rome and internal anarchy from a too rampant individualism, the false position in which the Church had been placed produced a considerable loss of enthusiasm in her ranks, and rendered her willing, at any rate, to tolerate the worship of those who had made common

cause with her against the Romanists, and ultimately to connive at their participation in the government. From such toleration to legal recognition was a natural step, but it took some time to accomplish. Prejudice was strong where argument was weak; and the utterances of a few persons whose politics were more prominent than their religion, were interpreted as expressing the opinions of the whole religious section to which they nominally belonged.

There were then two bodies—the Catholic and the Protestant Dissenters—against whom the Church found it necessary to protect herself, and to whose faith she had finally acquiesced in the extension of a legal recognition. The position of the two bodies was so different that it will be well to treat them separately. In each case the process will be similar; for it will be necessary to notice in order first the restraints imposed upon their religious worship and the disabilities in civil life attached to all who were not professing members of the Church, and then the gradual withdrawal of all these restraints and disabilities until none but imaginary grievances and hardships remain.

Disabilities
of Roman
Catholics.

The measures of the legislature against Romanists fall into two periods. The first of these was coextensive with the reign of Elizabeth and the early years of James I. Until 1570 religious legislation was occupied with a *definition of the position of the National Church* under the protection of the Crown.

Before the
Great Re-
bellion.
2 & 3 Edw.
VI. c.
5 & 6 Edw.
VI. c. 1.

This had been begun by Henry VIII's Act of Supremacy, and continued by Edward VI's two Acts of Uniformity (1548, 1552), which enforced the use of the two Prayer Books in succession under penalties which in the Act of 1548 extended to imprisonment for life for the third offence. The reaction under Mary necessitated the re-enactment on Elizabeth's accession of the Acts of Supremacy (1 Eliz. c. 1) and Uniformity (1 Eliz. c. 2). The former laid upon all beneficed clergy and all civil officials of the Crown, on penalty of forfeiture, an obligation to take the oath of supremacy renouncing the spiritual jurisdiction of every foreign prince or prelate. The latter forbade the use of any but the Book of Common Prayer and therefore, by implication, the saying of mass; while in order to enforce attendance at church it imposed a fine of one shilling on all absentees on Sundays and holydays. Three

years later (1562) the abortive conspiracy of the Poles rendered (5 Eliz. c. 1) all in holy orders, whether beneficed or not, all recipients of University degrees, and all lawyers, liable to be called on to take the oath of supremacy. A refusal protracted beyond three months made the recusant guilty of high treason. The obligation was further imposed on all members of the House of Commons, but Roman Catholic peers were saved for more than a century by Elizabeth's declaration of confidence in the hereditary councillors of the Crown. So far nothing, except by implication, had been enacted in the nature of a proscription of Romanists as such. But in 1571 the bull of deposition issued by Pope Pius V against Elizabeth in the previous year called forth a measure of direct *defence*. The penalties of high treason were threatened to all who published bulls from Rome or who absolved or reconciled others or were themselves reconciled to the Church of Rome; in other words, all priests exercising their functions and all converts. The systematic attack of the Jesuits which began in 1580 called forth, for the first time, *offensive* legislation against the adherents of Rome. An Act of 1582, while repeating the threats of the previous Act, and increasing the penalty imposed by the Act of Uniformity on absentees from church to £20 a month or imprisonment until they conformed, also subjected to fine and imprisonment the celebrant and the willing attendant at a mass. A later statute authorized the seizure of two-thirds of the delinquent's lands and goods. In 1584 the Jesuits themselves were attacked in a law which not only commanded all kinds of priests, whether Jesuits or otherwise, to leave the country in forty days under penalties of high treason, but even adjudged all who harboured them as guilty of felony, and threatened with fine and imprisonment any who knew of their presence in the country and did not inform against them. A final statute of this reign (1592) aimed against the laity, forbade the persons who, for the first time, were described as 'Popish recusants,' to move more than five miles from their usual place of residence under pain of forfeiture of all their possessions. The general effect of these laws was that they 'compelled every Catholic to attend the Anglican service, suppressed absolutely and under crushing penalties the celebration of the mass, proscribed the whole Catholic priesthood,

¹ Lecky,
Hist. of
Eng. i.
272.

² Jac. I.
c. 4, 5.

After the
Great
Rebellion.

and made it high treason for any English priest from beyond the sea to come to England, for any Catholic graduate to refuse for the third time the oath of supremacy, for any Protestant to become a Catholic, or for any Catholic to convert a Protestant¹. Nor were these laws allowed to remain inoperative. About 200 persons suffered the extreme penalty of death, of whom the majority were priests; and despite Burleigh's protestation that no one was put to death solely for his religious opinions, more than half the victims perished after all danger of foreign interference had been removed by the destruction of the Armada. Elizabeth's successor began with every intention of leniency, being greeted on his accession by the pope and helped in the discovery of plots by the leading Romanists in England. He desired to leave the laity in peace, and therefore, shortly after his accession, he remitted the fines incurred under Elizabeth's laws. But at the same time, he hoped to starve them into union with the National Church by banishing the priests. This was done by proclamation, and for further security in case of need, all Elizabeth's penal legislation was confirmed (1604). But such a policy left James the victim of circumstances. A rumour of his own intended conversion caused him, in self-justification, to enforce the recusancy fines; and the Gunpowder Plot, which was the result of this return to severity, was the occasion of the enactment of the severe law of 1606, by which not only was every Roman Catholic debarred from the professions of the law and medicine, and forbidden to act as a guardian or trustee, but he was compelled to take a more stringent oath of allegiance, which contained a denial of the papal power to depose kings, and his house was liable to be visited by magistrates in search of arms. But above all, it was enacted that every recusant should receive 'the blessed sacrament of the Lord's Supper' at least once a year in his parish church under penalty of a fine of £60 or the forfeiture of two thirds of his lands. This was the beginning of the *use of the sacramental test*, which, perhaps more than any other single cause, degraded the ordinances of the Church in the next century to little more than a guarantee of political opinions.

The unwillingness of the kings rendered impossible any further anti-Catholic legislation under the two first Stuarts.

James desired to propitiate Spain, and he and his son promised to humour France by a relaxation of the penal laws. The only hope of the Romanists lay with the Crown, so that under the Commonwealth they were prescribed along with all Churchmen for political as much as for religious opinions. The triumphant Church of the Restoration attacked primarily the Commonwealth's men in the laws known from their author as the Clarendon Code. Incidentally, of course, the Romanists were also hit by the prohibition of all services except those of the Church and the application of the sacramental test to all candidates for municipal office. Charles II's attempts in the interest of the Romanists, both at indulgence and at comprehension, failed, and Parliament proceeded to close all avenues to them by the *Test Act* of 1673. Elizabeth's Act of Supremacy ^{25 Car. II.} did not make the oath contained in the Act a necessary qualification for any office except membership of the House of Commons; and both by neglect of the Act and by the use of disingenuous explanations of the oath when taken, Romanists had held offices in the State. At the moment of the passing of the Act, the Treasurer, Lord Clifford, and the Lord High Admiral, the Duke of York, were both avowed Roman Catholics. It was now enacted that all holders of temporal office must receive the sacrament according to the rites of the Church of England and must make a declaration that they rejected the doctrine of transubstantiation. The two statesmen mentioned above resigned their posts, and five years later (1678) the ^{30 Car. II.} Commons, after several unsuccessful attempts, obtained the assent of the Lords to the imposition of a test on members of both Houses, consisting of the oaths of allegiance and supremacy and a declaration that the worship of the Church of Rome is idolatrous. ^{st. 2. c. 1.} The requirements of this statute were nothing new to members of the House of Commons, but for the first time they were made applicable to the House of Lords, and caused the exclusion of about twenty peers, although, much to the chagrin of the country party, the Duke of York was specially exempted from the operation of the statute. Indeed, it was this exemption which led directly to the introduction of the Exclusion Bill. The Calvinism of William III did not prevent him from having dealings with Rome against their common enemy, Louis XIV, and the Tory

11 & 12
Will. III.
c. 4.

1 Geo. I.
st. 2. c. 13,
55-
3 Geo. I.
c. 18.

Early re-
laxations
of the
penal
code in
England,
1778-1791.

party, in feigned alarm and with a real desire to annoy the king, passed an Act in 1700 which has been described as 'perhaps the darkest blot upon the history of the Revolution' (Mr. Lecky). The intention of the Act was to drive the Romanist proprietors of land out of the country. For it required that all adherents of the popish religion should, within six months of reaching the age of eighteen, take the oaths of allegiance and supremacy and subscribe the declaration of 1673 and 1678 against transubstantiation and the worship of saints. The penalties for neglect were an incapacity to purchase land, and the transference of an inheritance to the next of kin who was a Protestant. Nor was this all. Perpetual imprisonment was denounced against all priests exercising their functions and all papists who kept schools or took part in the instruction of youth; nor were children to be sent abroad to be educated as Roman Catholics. The discovery of all who contravened this statute was stimulated with a reward of £100. The English Parliament was merely imitating some of the ferocity of its Irish contemporary; but the statute seems to have taken little effect, even when it was capped by the equally stringent Acts passed in the early years of George I's reign. By these the oaths of allegiance and supremacy and of abjuration of the Pretender were to be taken by all civil and military officers, members of colleges, teachers, preachers, and lawyers; the two oaths could at any time be tendered by two justices of the peace to any Romanist whom they regarded as disaffected, and his refusal to take them rendered him liable to the penalties of recusancy. Moreover, Catholic landowners who, despite the Act of 1700, had maintained their estates, were required to register them together with all future conveyances and wills. Nor was this all; for the annual law which established the land tax imposed it on Catholics at a double rate, and in 1722 a special tax in addition was levied on their property.

Such were the chief provisions of the penal code which, had it been executed to the letter, would have exterminated the adherents of Rome. These may have been, as a writer of their religion has described them, a half proscribed and socially ostracized section of English society; but they owed their continued existence in comparative security to the general

indifference of the people and the admirable conduct of the judges, who refused to subordinate the law to the petty spite of personal enemies. The Acts of George I's reign are almost justified by the disaffection of the Romanists to the reigning family, and they expressed more nearly than might be supposed, the feeling still cherished by the English people generally against the Roman Catholics. For, the first successful attempt at relaxation was followed by the greatest riot of which English history has to tell. In 1778 Sir George Savile procured the passing of an Act by which the penalties denounced by the Act of 1700 against popish priests and schoolmasters and Roman Catholic heirs or purchasers of land were removed, provided they took a special oath abjuring not only the Pretender, but also the temporal jurisdiction and deposing power of the pope, and the doctrine that faith should not be kept with heretics and that heretics may be lawfully put to death. The proposed extension of this Act to Scotland roused an unexpected amount of popular feeling, which culminated in the Gordon riots (1780), during which London was for four days in the hands of the mob. But Parliament stuck to its Act. The petitions for repeal of the late statute were met by a series of resolutions moved by Burke, with the approval of the Government of the day, vindicating the Act and condemning the misrepresentations to which it had been subjected. The only concession, stigmatized by an historian as 'unworthy,' was a bill also introduced by Savile, forbidding Romanists to teach the children of Protestants; but it was thrown out in the House of Lords. But this Act had done nothing to remove the disabilities of Catholic landowners or the disqualifications for nearly all the professions under which the whole class of Romanists laboured. The removal of some of these was the object of Mr. Mitford's Catholic Relief Act of 1791. Its introduction was preceded by a statement of opinions obtained from a number of foreign Universities against the power of the Roman Church to interfere in civil affairs in England or to release English subjects from the oath of allegiance, and against the supposed Romanist belief that faith should not be kept with heretics. This was followed by a protestation of the leading Roman Catholics to Parliament in condemnation of the doctrines commonly attributed to them

18 Geo. III.
c. 60.

31 Geo. III.
c. 32.

on the subject of the papal power of deposing or licensing the murder of sovereigns. It was on this protestation and in imitation of an Irish Act of 1774, that an oath was framed whose recipients were freed from many penalties and disabilities. Thus the statutes dating from Elizabeth's time against popish recusants were abolished, and the law recognized the exercise of Catholic worship and the existence of Catholic schools. Moreover, Romanist landowners were freed from the necessity of enrolling their wills and deeds, and were no longer liable, on the summons of two justices of the peace, to condemn themselves by refusing to take the oath of supremacy and to make a declaration against transubstantiation. Finally, the restrictions on the exercise by Catholics of all professions connected with the law were removed, and Catholic peers were restored to access to the king, though not as yet to their places in Parliament. But the Act was far from complete. A number of restrictions were still imposed. Thus Catholic chapels and schools, and the names of their priests and schoolmasters had to be registered, and the services must all be conducted with open doors. No steeple or bell was allowed to the chapels; no endowed college or school must be founded, and no monastic order introduced; no priest was to wear his dress or to perform a service in the open air; and, as a final security, no Protestant child was to attend a Catholic school. It should be noticed in connexion with this Act that from this time the double land tax was regularly omitted from the annual Land Tax Act by which it was imposed.

Disabilities
of Roman
Catholics
in Ireland.

Meanwhile, in Ireland a penal code far more searching and proscriptive than had obtained in England, was being subjected to a gradual and steady relaxation, until the legislature of a country where Romanism was a real distinction of race as well as creed, had advanced in principles of toleration and even legal recognition far beyond the parallel body in England with whom it remained a mere unreasoning prejudice. A series of laws passed under William and Anne banished the Roman Catholic from civil life. He could neither vote for nor sit in Parliament, he was excluded from the corporations, the magistracy, the entire legal profession, the army and the navy. He was denied the care of youth whether as guardian or schoolmaster. If he was not denied the exercise of his religion, the

full means of its continuance was much hampered by the proscription of all bishops and other ecclesiastics claiming to exercise jurisdiction ; and while regular clergy were forbidden, all secular priests must be registered and were subsequently compelled to take the oath of abjuration of the Pretender. The landowner was also worse off than in England. He could neither purchase nor inherit land nor bequeath it by will. He could not intermarry with a Protestant. His estate descended equally to all his sons ; or if the heir became a Protestant, he could turn his father into a life tenant, and so treat the fee simple of the land as his own possession.

Soon after the middle of the eighteenth century the relaxation of these prohibitions was begun by the action of the Lord-Lieutenant, who in 1759 directed that marines should be raised from the Romanist districts ; and the licence was soon after extended to recruits for the army. In 1774, the first Statute which dealt with the matter, merely allowed Catholics to attest their loyalty by taking before a justice of the peace the oath of allegiance and a form of declaration renouncing the Stuarts and certain commonly attributed Romanist doctrines as to the treatment of heretic sovereigns and their followers. Meanwhile, the many attempts which had passed the Irish Commons only to be rejected by the English Privy Council, to allow Catholics to lend money in mortgages upon land, ended in the more generous Act of 1778, which not only permitted them, after taking the oaths of the Act of 1774, to hold leases of land and to inherit land, but removed alike the necessity of an equal division among all the sons and the premium hitherto placed by the law upon the apostacy of the heir. An Act of 1782 further allowed those who took the oaths of 1774 to purchase and bequeath land so long as it was not in a parliamentary borough. It also abolished the registration of priests and the prohibition on the presence of bishops and regular clergy in the country ; and it opened the teaching profession to Catholics, provided they had no Protestant pupils. Indeed, notwithstanding the wide provisions of the Act, it was limited by a number of restrictions many of which were afterwards copied in the English Act of 1791. In 1792 the legal profession was thrown open by statute, though Catholics were prevented from becoming king's counsel or judges. By the

Relaxa-
tions.

same Act all remaining restrictions on education, whether at home or abroad, and the severe penalties on the intermarriage of Protestants and Catholics were removed. Finally, an Act of 1793 did away with the few remaining disabilities under which Catholics laboured as to worship, education, and the disposition of their property. Provided they took the oath of allegiance and a new oath of abjuration of certain pernicious doctrines, they could become elected members of all corporations and receive degrees and hold offices of Dublin University. Trinity College alone being excepted. They could hold all civil and military posts except the very highest, and they could keep arms with certain restrictions. They could exercise the franchise, but were not eligible for seats in either House of Parliament.

Catholic
Emancipa-
tion.

In England, owing to the hostility of the king, there was after 1791 a long pause in the grant of further concessions. Pitt's attempt to fulfil the expectations of those who had helped him in bringing about the Irish Union, wrought his own fall; and when Fox in 1805 took up the cause of the Catholics, Pitt was found in opposition. After Fox's death, Lord Grenville tried to introduce an Army and Navy Service Bill, which proposed to extend to England so much of the Irish Act of 1793 as related to the army and navy, but without the restrictions which closed the highest ranks to Catholics. The king, however, refused to assent to the removal of these restrictions, and the ministry resigned. It was not till 1812 that the movement in favour of Catholic Emancipation became serious. The claims of the Romanists were treated as an open question by the newly formed ministry of Lord Liverpool, and among the advocates of complete concession were found such names as those of Canning, Grattan, and Marquis Wellesley. Canning's motion for considering the laws relating to the Roman Catholics was passed in the Commons by a majority of 129, but it went no further; and in the next year (1813) although Grattan's proposal for opening Parliament to them was thrown out, an Act was passed enabling Irish Roman Catholics to hold in England all the civil and military offices which the Irish Act of 1793 allowed them to hold at home. This was followed in 1817 by the more general Military and Naval Officers' Oaths Bill, which

practically opened all ranks in those services to Roman Catholics and Dissenters alike. But the full measure of enfranchisement did not come for twelve years. Bills were rejected almost annually, until the pressure of the Catholic Association and the disaffected condition of Ireland forced the Tory government of the Duke of Wellington and Sir Robert Peel to concede the demands of the advocates of emancipation at the same time as they suppressed the formidable association. By the Catholic Emancipation Acts of 1829, a new oath was substituted for the oath of supremacy, ^{10 Geo. IV, c. 7, § 2.} and Roman Catholics were no longer debarred from either House of Parliament. All corporate and judicial offices except those connected with the ecclesiastical courts, were thrown open to them, as well as all civil and political offices except those of Regent, Lord Chancellor in England and Ireland, and Lord-Lieutenant of Ireland. The restrictions or securities were reduced to a minimum, and the dark prognostications of the continued opponents of the bill were in no sense realized. In 1851 the provision of the pope for the ecclesiastical government of England by bishops with English titles caused the defensive measure of the Ecclesiastical Titles Bill, which prohibited the use of territorial titles by the bishops and made penal the introduction of papal bulls. But no serious effects followed, the titles were retained, the excitement died away, and in 1871 the Act itself was repealed.

The Roman Catholics had been proscribed in the first place as a political party in alliance with a foreign power. The Nonconformists met with similar treatment because they desired some change extending from a modification to the total abolition of the existing system of ecclesiastical rule. The Romanists repudiated the Church of England as heretical and schismatic; the Church drove out the Nonconformists for disciplinary as well as doctrinal reasons. Before the Great Rebellion the Nonconformists would not accept the position which the Anglican party assigned to them; indeed, many of the clergy and at least two archbishops after Cranmer, namely Whitgift and Abbot, openly sympathized with them. The legislation of a Puritan Parliament restricted itself to the Act of Uniformity, with its penalties for non-attendance at the parish church, and to an Act of 1593, aimed perhaps against the as yet unpopular

Disabilities
of Noncon-
formists.

Independents, by which any one above the age of sixteen, who should forbear for a month to go to church, should be imprisoned for a month until he made open submission and declaration of conformity. Those who continued obdurate should abjure the realm and not return without licence on penalty of death. The real coercion of the Nonconformists was carried out by the High Commission Court, and in the impossibility of reviving it after the Restoration recourse was had to further legislation, which was made possible by the predominance of the cavalier interest in Parliament. The result was the *Clarendon Code*, a series of four Acts initiated by that minister for the purpose of securing the triumph of the Anglican party. By the first of these, the *Corporation Act* (1661), the power of the Presbyterians in their strongholds was attacked; for, the reception of the sacrament according to the rites of the Church of England and of an oath repudiating the Solemn League and Covenant were made the conditions of municipal office. The last *Act of Uniformity* (1662), by re-establishing the Prayer Book and enforcing episcopal ordination, struck at those Presbyterian ministers who had, under the Commonwealth, been lawfully inducted into vacant livings, and had been allowed by the Convention Parliament at the Restoration to retain them. It took effect on no less than two thousand benefice-holders. The *Conventicle Act* (1664) broke up all services except those of the Church, and the *Five Mile Act* (1665) forbade all clergy who had not taken an oath of non-resistance prescribed in the Act of Uniformity, to reside within five miles of a corporate town. By this means the dissenters, as they had now become, were to be officially proscribed and spiritually starved in the places where they had the greatest hold.

Relaxation
by
(a) Con-
nivance;

Charles II's attempts at toleration by Acts of Indulgence, and at comprehension by the Savoy Conference and the introduction of a bill in Parliament, came to nothing; for the dissenters sacrificed themselves to the interests of Protestantism and accepted the Test Act, which excluded them together with the Roman Catholics from all official posts in the State. Their reward was the *Toleration Act* of 1689 (1 Will. and Mary c. 8), by which all persons were exempted from penalties incurred under the statutes enforcing conformity with the Church, who

should take the oaths of allegiance and supremacy, and should subscribe a declaration against transubstantiation ; if they were ministers, they must further subscribe all except three and a half of the Thirty-nine Articles, and must register their chapels. Thus the Acts which enforced conformity with the Church were not repealed ; they were only suspended in the case of those who accepted certain tests. Under these conditions meetings of Protestant bodies for worship were legalized, but nothing had been done to remove the civil disabilities which excluded all dissenters from Corporations, offices of State and the Universities. But despite this Act no settled policy was pursued towards the dissenters until the accession of the Hanoverians. The Whig influence procured the establishment of the Presbyterian Kirk in Scotland, and the grant by William III of a small endowment under the name of the *regium donum* to the Presbyterian ministers in Ireland ; while dissenters of many shades were using the freedom of the Toleration Act to set up schools for the education of their youth. The Tories throughout Anne's reign made a desperate attempt to go back upon the Toleration Act, and in the end they nearly succeeded. For, in 1711, after many previous attempts which had failed in the Whig House of Lords, they passed the *Occasional Conformity Act* to prevent the more lax dissenters from qualifying for office by the necessary reception of the sacrament. This was followed in 1714 by the *Schism Act*, aimed against the dissenters' schools, and forbidding any one to keep a public or private school or to act as tutor without a licence from the bishop. He must further qualify himself by engaging to conform to the English liturgy and by having taken within the year the sacrament according to the rites of the English Church. The Whigs were strong enough to obtain a few small remissions in this Act ; but the accession of the Hanoverians robbed both Acts of their intended effect. The new dynasty and the wealthy dissenters needed each other's support ; and although the strength of the Tories in the country and the precarious tenure for some years of the Hanoverians forbade the ministers to risk the alienation of any sections of society by a more definite legal recognition of their claims, the dissenters obtained a considerable relaxation of the laws which told against them. Thus the Occasional Conformity and

Schism Acts were repealed in 1718, although in view of a late occurrence in the City of London any mayor or magistrate was forbidden to attend a meeting-house with the insignia of his office. Again, the limit of three months within which after his admission an official was compelled by the Test Act to receive the sacrament, was extended to six. Finally, in the first year of George II's reign it became a custom for Parliament to pass an Act of Indemnity in favour of those who had accepted office, but had not taken the sacrament within the specified time. With a few exceptions in its early days, probably in order to prevent the dissenters counting upon it, this Act became an annual measure until the Test Act was repealed a century later (1727-1828). But at the best it was a connivance at the breach of a law which remained upon the statute-book; and since it professed to meet the case of those who had been prevented from complying with the Act 'through ignorance of the law, absence or unavoidable accident,' it formed no protection for the more conscientious among the dissenters. The extent to which the whole class still lay at the mercy of unscrupulous persons is illustrated by a course of action to which no less a body than the Corporation of the City of London resorted about the middle of the century. A bye-law of 1748 imposed a heavy fine on all who refused to serve in any office of the Corporation to which they were elected; and, until the severe condemnation of the House of Lords in 1759, it became a regular practice to elect dissenters as sheriffs and then to exact the fine, because by the terms of the Corporation Act of 1661 they could not serve.

(b) Repeal. The movement in favour of a repeal of the laws which imposed disabilities upon the dissenters was almost coterminous with the similar question as affecting the Romanists. But in the case of the former it was the indirect result of an attempt by the latitudinarian party in the Church to obtain a legislative relaxation from the necessity of signature to the Thirty-nine Articles. This was required not only on ordination, but at Oxford it had been a preliminary to matriculation since 1581, and at the somewhat more liberal Cambridge to taking a degree since 1616. This movement ended, as far as the dissenters were concerned, in an Act which, after two failures in the Lords, became law in 1779, and allowed any dissenter to preach

and teach on condition that, for the subscription to the articles hitherto required, he should take a substituted declaration that he was a Christian and a Protestant dissenter, and took the Scriptures for his rule of faith and practice. The Irish Parliament in the case of the dissenters also set a worthy example to the English assembly ; for in the same year it admitted them to civil and military offices without enforcing the reception of the sacrament. This was simply to repeal the Test Act in their behalf, and it was before long followed in England by a movement for the repeal of the Test and Corporation Acts. The leaders were Beaufoy, who proposed bills for that purpose in 1787 and 1789, on the latter of which occasions he was only defeated by twenty votes ; and Charles James Fox, whose suggestions, however, were in 1790 thrown out by a large majority. For, to Beaufoy's exposition of the serious disabilities under which the dissenters laboured and the penalties against which the annual Acts of Indemnity by no means effectually protected them, Burke opposed the hostility to the Church publicly evinced by such leaders as Drs. Price and Priestley, and, as against Fox, the recent overthrow of the apparently strongly established Church in France. The maintenance of a religious test was treated by all speakers as a mere matter of expediency, and the circumstances of the French Revolution lulled the question to slumber for many years. In 1812 a movement in the right direction was made when Lord Sidmouth's attempt to restrict the privileges granted to dissenting ministers by the Act of 1779, called forth an unexpected sympathy with principles of toleration which produced an Act relieving dissenters from the oaths and the declaration required by the Toleration Act and the Act of 1779. It was not until 1828 that the question of the repeal of the Test and Corporation Acts was again mooted. Under the championship of Lord John Russell the measure was now effected (1829), and for the sacramental test was substituted a declaration, to which the House of Lords in Committee added the words 'on the true faith of a Christian,' thus rendering it inapplicable to the Jews. Three smaller grievances still remained. Dissenters were obliged to be married at the parish church ; they were compelled to pay church rates ; and the necessity of signing the Thirty-nine Articles excluded them from the Universities.

^{52 Geo. III,}
c. 12.

Lord Hardwicke's Marriage Act of 1753 had been the first interference with the canon law which had hitherto prevailed, and had allowed the celebration of a marriage by a priest at any time or place with no restraint of registration or of the necessary consent of parent or guardian. To put an end to the scandals which had arisen from what were known as 'Fleet marriages,' it was enacted, after several lesser expedients had failed, that no marriage should be valid unless performed by a clergyman of the Church of England after the banns had been published thrice in the parish church and a licence had been procured, which, in the case of a minor, should only be granted with the permission of the parents or guardians. A movement for the amendment of this Act alike in the interest of Catholic and Protestant dissenters had taken place between 1819 and 1827; but it was not until 1836 that Lord John Russell, after two failures, passed two bills—one which provided for the civil registration of births, marriages, and deaths; and a second, which not only authorized the marriage of dissenters in their own chapels registered for the purpose and after due notice to the official registrar, but even allowed those who required no religious ceremony to enter into a civil contract before the same official. The compulsory payment of church rates received a blow in the decision of the House of Lords in the case of *Burder v. Veley* (1857), in which was established the power of the majority of a vestry to refuse their levy. But this was not enough. The dissenters required their total abolition, and from 1841 a motion to this effect became almost annual. Not till 1858, however, did it receive the assent of the Commons; and, finally, in 1866 a compromise which made the payment voluntary passed the Commons and became law in 1868. The abolition of all religious tests for entrance to or participation in the benefits of the Universities, after two miscarriages in 1869 and 1870, received the assent of Parliament in 1871.

Separate
treatment
of
(1) The
Quakers;

It remains to notice shortly three bodies who have received exceptional treatment at the hands of the legislature. From the first recognition of the principle of toleration the *Quakers* have met with a specially considerate treatment. By the Toleration Act they were required, in the place of all oaths or signature to declarations, merely to affirm their adherence to

the Government, their abjuration of transubstantiation, and their belief in the Trinity and the inspiration of the Bible. In 1695 for the oath required of a witness in a law court, they were enabled to substitute an affirmation 'in the presence of Almighty God.' Even this was withdrawn by a subsequent statute to meet their scruples. They were further exempted from Lord Hardwicke's Marriage Act. In 1833 Mr. Pease, a Quaker, was allowed by the Commons to take his seat on making an affirmation; and an Act was subsequently passed to enable Quakers, Moravians and Separatists (extended in 1837 to those who had been such) to substitute an affirmation for an oath on their entrance to Parliament.

There were, on the other hand, two classes—the *Unitarians* and the *Jews*—to whom Parliament was especially slow in extending religious toleration. The benefits of the Toleration Act were particularly limited to all believers in the doctrine of the Trinity. It was not till 1774 that the first Unitarian place of worship was opened by a seceded clergyman; nor was it until 1792 that Parliament was asked by Fox to extend some toleration to the body. This was obtained in 1813 (53 Geo. III, c. 160) and recognized their religious worship; while in 1836 they obtained, along with all other dissenters, the benefits of the Marriage Law Amendment Act.

The *Jews* had an equally hard struggle. They, together ⁽²⁾ The with the Quakers, had been exempted from Lord Hardwicke's ^{Jews.} Marriage Act. But they lay under every civil disability, and the repeal of the Test and Corporation Acts which gave relief to the consciences of other subjects outside the pale of the National Church, was for them only the beginning of trouble. For they could not take the oath of allegiance which was sworn on the Gospels, nor the new oath of abjuration 'on the true faith' of a Christian, and there were now no Indemnity Acts under the shelter of which they could creep into office. Consequently, attempts were made at once to meet their case. In 1830, and again in 1833, four Jewish Relief Bills were introduced, and on the last occasion even passed the Commons. In 1839, by Lord Denman's Act for amending the laws of evidence, they were able to be sworn on the Old Testament and so to take the oath of allegiance; while in 1845 they were admitted to Corporations. The struggle for admission to

Parliament was extended over a long period. In 1847 Baron Nathan de Rothschild was elected by no less a constituency than the City of London. After vainly waiting three years for a measure of relief, he attempted in 1850 to take the oaths with the omission of 'the true faith of a Christian'; but the House refused him permission. He continued nevertheless to be elected for the City, and in 1851 Mr. Alderman Solomons not only was elected for Greenwich, but took his seat within the bar of the House and refused to move. But he found no countenance, as he had hoped, from the law courts, and was obliged to await in patience the action of Parliament, which in a very grudging manner gradually admitted the entrance of Jews. Thus in 1858 the Lords gave way so far as to allow that either House, by resolution in each case, could exclude the insurmountable phrase from the oath of abjuration. In 1860 this could be done by a standing order of the Commons; and finally, in 1866, a new form of oath was introduced which changed the position of a Jewish member of Parliament from good-humoured toleration to definite legal recognition.

The general result of the growth of toleration has been that while the Church of England still maintains a certain connexion with the State, although she is neither endowed by the State nor exercises her spiritual functions as a department of the State; yet all other religious corporations are as efficiently protected by the law in the exercise of their rights, and are far more free from any external interference in the conduct of their internal concerns.

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